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George A. Bermann

Columbia Law School, gbermann@law.columbia.edu

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Articles

The Single European Act: A New Constitution for the Community?

GEORGE A. BERMANN*

If proof were needed that the European Economic Community is still the product of a careful tempering of integrationist impulses with preoccupations of national sovereignty, the recently ratified Single European Act¹ (Single Act or Act) amply supplies it. Although the Single Act represents the most comprehensive revision to date of the Treaty of Rome (EEC Treaty),² which established the European Economic Community (European Community or Community), it also reflects the continuing vitality of the view that functional change within the Community takes priority in time over structural and institutional reform. Rather than place European integration on a new set of political foundations, as many influential voices had urged, the Single European Act brings a combination of programmatic change and limited structural reform. While disappointing to some observers, mostly because the institutional framework of Europe remains largely the same and because the more important programmatic changes are not conspicuous on the face of the document, the Single European

* Professor of Law, Columbia University School of Law.

1. *Single European Act*, 30 O.J. EUR. COMM. (No. L 169) 1 (1987), reprinted in 25 I.L.M. 506 (1986) [hereinafter SEA]. The Act was signed by nine Member States at Luxembourg, Feb. 17, 1986, and by the other three at The Hague, Feb. 28, 1986. It came into force on July 1, 1987. See *infra* note 24 and accompanying text.

2. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty] (entered into force Jan. 1, 1958). The Single European Act's amendments to the existing Community treaties relate in almost all cases to the EEC Treaty. In fact, the European Community is composed of three communities: the European Economic Community the European Coal and Steel Community and the European Atomic Energy Community. Apart from the few provisions concerning the Court of Justice, none of the treaty amendments introduced by the Single European Act affects the Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty], or the Euratom Treaty, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter EAEC Treaty].

Act actually corresponds well to the realities of Community-building in a pragmatic-minded late twentieth century Europe.

I. THE POLITICAL BACKGROUND

By 1985, after years of constitutional self-examination, the European Community appeared to have reached a point of no return in the area of institutional reform. Since 1969, the Community had been the object of an almost continuous stream of studies and measures designed either to improve the functioning of its institutions or to produce a more cohesive legal order, or both.³ Only in December 1985, when the heads of state and government met as the European Council in Luxembourg, did the Member States finally settle upon a mutually agreeable framework for comprehensive reform. This framework was the Single European Act.

A parliamentary initiative led by Altiero Spinelli, an Italian member of the European Parliament and former European Commissioner, had begun the process that led to the adoption of the Single Act. Encouraged by certain institutional gains that the Parliament had made in previous years,⁴ Spinelli's committee on institutional

3. These initiatives are briefly described in Edward, *The Impact of the Single Act on the Institutions*, 24 COMMON MKT. L. REV. 19 (1987); Murphy, *The Single European Act*, 20 IRISH JURIST 17, 18-30 (1985). Among the milestones are: (1) the final communiqué of the Paris summit meeting of October 1972, declaring an intention to complete the economic and monetary union and to establish a European Union by 1980, see *Attainment of the Economic and Monetary Union*, 6 BULL. EUR. COMM. (Supp. 5) 5 (1973); (2) the decision taken at the Paris summit of 1974 to institutionalize the summit meetings of heads of state and government in the form of a European Council to convene regularly at least three times a year and to serve as the highest instance both in Community affairs and in European political cooperation, *Meeting of the Heads of Government*, 7 BULL. EUR. COMM. (No. 12) 6 (1974); (3) approval by the foreign ministers in 1970 and 1973 of a system of political cooperation in foreign policy consisting of regular consultation, harmonization of views and the possibility of joint action, *Report by the Foreign Ministers of the Member States on the Problems of Political Unification*, 3 BULL. EUR. COMM. (No. 11) 9 (1970) (Luxembourg Report); *Political Cooperation Between the Nine*, 6 BULL. EUR. COMM. (No. 9) 12 (1973) (Copenhagen Report); (4) issuance in 1973 of a Declaration on European Identity and the common declaration by the institutions of an intent to respect the European Human Rights Convention, *Declaration on European Identity*, 6 BULL. EUR. COMM. (No. 12) 118 (1973); *Common Declaration by Parliament, the Council and the Commission, on Fundamental Rights*, 10 BULL. EUR. COMM. (No. 3) 5 (1977); (5) establishment of the European Monetary Cooperation Fund by the Council in 1973 and of the European Monetary System by the European Council meeting at Bremen and Brussels in 1978, see *infra* notes 113-115; (6) issuance in 1975 of the Tindemans Report, commissioned at the 1974 summit, on the needs of European union, *Report on European Union*, 9 BULL. EUR. COMM. (Supp. 1) (1976); and (7) the report of the "Three Wise Men" (B. Biesheuvel, E. Dell & R. Marjolin), presented to the European Council in 1979 on the subject of institutional and procedural reform. COMMITTEE OF THE THREE TO THE EUROPEAN COUNCIL, REPORT ON EUROPEAN INSTITUTIONS (1979). A summary of this 100-page report appears in 12 BULL. EUR. COMM. (No. 11) 25 (1979).

4. In 1976, the Council of Ministers (Council) issued a decision, contemplated in the

affairs set out to formulate major amendments to the EEC Treaty. In the end, the committee drafted an altogether new Treaty of European Union (Draft Treaty or European Union Treaty).⁵ Approved overwhelmingly by the full Parliament in February 1984, the European Union Treaty was submitted for consideration to the parliaments and governments of the Member States.

The Draft Treaty vividly illustrates a political as opposed to a functional approach to European integration. It contemplated the creation of a European Union composed of the citizens of the Member States, who were also to be citizens of the Union.⁶ The European Council would constitute the Union's collective head of state. All of the Community's existing legislation and other achievements, except as amended by the Draft Treaty itself, were to constitute the law of the Union. This law would embrace not only the activities of the three existing communities, but also the programs of European monetary and political cooperation which had previously been conducted on a separate basis.

The drafters provided two means for the Union to accomplish its goals: 1) through common action by Union institutions, and 2) through cooperative action (action by the constituent states voting in the European Council).⁷ Like many modern constitutions, the Draft

original EEC Treaty, setting out the methods and dates for the direct election by universal suffrage of the European Parliament. *Council Decision 76/787*, 19 O.J. EUR. COMM. (NO. L 278) 5-6 (1976). The first direct election took place in June 1979, thus finally lending the institution democratic legitimacy. In addition, Parliament had begun exercising its newly-acquired budgetary prerogatives by vetoing the draft budget on several occasions. Finally, the Court of Justice acknowledged that failure to consult Parliament as required by the Treaty was a ground for annulling a Council regulation. *Roquette Frères v. Council*, Case 138/79, 1980 E. COMM. CT. J. REP. 3333, [1979-1981 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8703 (1980); *Maizena GmbH v. Council*, Case 139/79, 1980 E. COMM. CT. J. REP. 3393, [1979-1981 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8704 (1980).

5. *Draft Treaty Establishing the European Union*, 27 O.J. EUR. COMM. (NO. C 77) 33 (1984) [hereinafter *Draft Treaty*]. For a detailed discussion of the Draft Treaty, see R. BIEBER, J.-P. JACQUÉ & J. WEILER, *AN EVER CLOSER UNION* (1984); F. CAPOTORTI, M. HILF, F. JACOBS & J.-P. JACQUÉ, *THE EUROPEAN UNION TREATY* (1986); Jacqué, *The Draft Treaty Establishing the European Union*, 22 COMMON MKT. L. REV. 19 (1985); Lodge, Freestone & Davidson, *Some Problems of the Draft Treaty on European Union*, 9 EUR. L. REV. 387 (1984).

6. Significantly, the Draft Treaty provided that it would enter into force upon the consent of the governments of a majority of the Member States whose population represented two-thirds of the current Community's total population. Thus, the consent of all the Member States was not required. *Draft Treaty*, *supra* note 5, art. 82.

7. *Id.* art. 10. The Draft Treaty expressly embraced as matters of Union concern social and health policy, consumer and environmental protection, regional policy, and policy in the areas of education, research, culture and information. *Id.* arts. 55-62. Whether the international relations of the Union were to be carried out by common action or by cooperation was to depend on whether the Union had exclusive or concurrent competence in the subject matter. For certain fields (including international relations and industrial cooperation), the Treaty pro-

Treaty distinguished between exclusive and concurrent Union competences. The Member States could not act in those matters within the Union's exclusive competence.⁸ However, where competences were concurrent,⁹ Member States would be free to act until the Union had done so.¹⁰ The European Union immediately granted the fundamental rights and freedoms recognized by the Member States and the European Human Rights Convention¹¹ to all persons coming within its jurisdiction, but also committed itself to introducing a bill of rights proper into the Treaty within five years.

The drafters of the European Union Treaty contemplated major institutional changes as well, the most dramatic of which affected the European Parliament. Jointly with the Council of the Union, the successor to the Council of Ministers (Council), Parliament was to exercise legislative authority¹² and participate in both budgetary matters and the conclusion of international agreements. The Treaty also gave Parliament the right to confirm nominations to the Commission and to approve the Commission's program before its members could take office.¹³

Mobilized by Parliament's bold proposals for Community re-

vided a procedure for transferring from the cooperation to the common action regime. *Id.* art. 11.

Just as before, the European Council would bring together the heads of state or government of the Member States. This is still the case under the Single Act. *See infra* note 164.

8. The difference between exclusive and concurrent Union competence is set out in article 12 of the Draft Treaty. *Draft Treaty, supra* note 5, art. 12. Matters within the Union's exclusive competence included freedom of movement in the common market and European trade and competition policy. *Id.* arts. 47, 48 & 64(2).

9. Matters falling within the areas of concurrent competence included monetary and sectoral policy. *Id.* arts. 51, 53.

10. In areas of concurrent competence, Union action was to be subject to the "subsidiarity principle." The subsidiarity principle in concurrent jurisdiction is stated in article 12(2) as follows:

The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers.

Id. art. 12(2). Thus, the Union was to act if and when common action would be more effective than separate Member State action.

11. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

12. *Draft Treaty, supra* note 5, art. 36. Article 38 demonstrates that Parliament's legislative authority under the Draft Treaty did not rise to the level of co-decision with the Council. However, Parliament's active opposition to a measure would defeat it in the legislative process. *Id.* art. 38(1).

13. *Id.* art. 16. Under the Draft Treaty, the European Council would appoint the President of the Commission following the European elections. The President in turn would select his or her colleagues. Members of the Commission would have to resign as a body in the event Parliament by a qualified majority vote adopted a motion of censure. *Id.* arts. 25, 29, 31.

form, the Member States sought to seize the initiative. Even before Parliament had spoken, the foreign ministers of Germany and Italy had developed the Genscher/Colombo Plan¹⁴ which bears their names and pursued objectives broadly comparable to those of the Draft Treaty. In the end, however, all that emerged from the Plan was the "Solemn Declaration on European Union," a general statement of aspirations issued by the European Council at Stuttgart in June 1983.¹⁵ The failure to achieve concrete results has been attributed to the Member States' unreadiness to escalate their level of commitment to the Community without first resolving certain chronic points of dispute—the budget, agricultural policy and the political aspects of the Community's enlargement.¹⁶

The Stuttgart Declaration represented an inadequate response to the European Parliament's call for sweeping reform. However, bolstered by successful meetings at Brussels in March 1984 and at Fontainebleau in June 1984, and prodded by Parliament's adoption of the Draft Treaty in February 1984, the European Council finally decided to act. At Fontainebleau, the Council established an ad hoc committee on institutional affairs (Dooge Committee), composed of Member State representatives, to examine the general state of European political cooperation and union. The committee was to report back to the Council at its Milan meeting in June 1985.¹⁷

As might have been expected of a group of Member State representatives, as opposed to a Community institution like the European Parliament, the Dooge Committee generated a considerably more cautious set of recommendations than those embodied in the Draft

14. The official name for the Genscher/Colombo Plan was the Draft European Act. For the text, see Appendix A of Neville-Jones, *The Genscher/Colombo Proposals on European Union*, 20 COMMON MKT. L. REV. 657, 685-90 (1983). Basically, it envisaged achieving closer political union through a combination of Community action and political cooperation, coupled with enhanced participation by Parliament and greater use of majority voting.

15. *Solemn Declaration of European Union*, 16 BULL. EUR. COMM. (No. 6) 24 (1983) [hereinafter *Stuttgart Declaration*].

16. See Feld & Mahant, *New Efforts for European Union: Hopes, Progress, and Disappointments*, 10 J. EUR. INTEGRATION 39, 46-47 (1986); Glaesner, *The Single European Act*, 6 Y.B. EUR. L. 283 (1987).

17. Glaesner, *supra* note 16, at 284. The European Council at the same time organized a second committee, the Adonnino Committee, to investigate means of deepening the Community-mindedness of the peoples of Europe. In a pair of reports, the Adonnino Committee recommended such diverse measures as elimination of boundary checks on persons and goods, a general system for the recognition of equivalence in university diplomas, voting rights for Community citizens, greater cultural cooperation including creation of a European Academy of Science, Technology and Art, greater cooperation on drug abuse and other social problems, the "twinning" of towns, and the adoption of community flags, emblems and anthems. *A People's Europe: Reports from the Ad Hoc Committees*, 18 BULL. EUR. COMM. (Supp. 7) 7, 17 (1985). Both committees' reports were approved by the European Council. *Id.* at 15, 31.

Treaty. Its report emphasized functional and programmatic change over wholesale institutional reform.¹⁸ In fact, rather than build upon the Draft Treaty, which many had come to view more as a political statement than a blueprint for reform,¹⁹ or make a counterproposal, the committee, by divided vote, proposed convening an intergovernmental conference under article 236 of the EEC Treaty for the purpose of negotiating amendments to the existing treaties.²⁰ By the time the European Council met in Milan to consider the Dooge Committee report, it had received a detailed Commission white paper forcefully advocating completion of the Community's internal market by 1992.²¹ The Commission's strong appeal for the removal of all physical, technical and fiscal barriers to trade encouraged the Council, again over the dissent of several states, to convene an intergovernmental conference to consider all aspects of Community reform.²²

Notwithstanding the divided vote, every Member State, plus the prospective members Spain and Portugal, participated in the ensuing intergovernmental conference held in Luxembourg in September 1985. The conference's work was divided into two dossiers: 1) regularizing the process of European political cooperation that had

18. *Report of the Ad Hoc Committee on the Institutional Affairs*, 18 BULL. EUR. COMM. (No. 3) 102 (1985) [hereinafter *Dooge Committee Report*]. Programmatic change included: creation of a truly homogeneous internal economic area, promotion of common policies in noneconomic domains (environment, social policy, culture, the judiciary), and intensified foreign policy and defense cooperation. On the institutional side, the Dooge Committee called for, among other things, greater use of majority voting, more delegation to the Commission, less reliance on the European Council, and the vesting of limited decisional power in Parliament.

19. Pescatore, *Some Critical Remarks on the "Single European Act,"* 24 COMMON MKT. L. REV. 9, 14 (1987).

20. See Lodge, *The Single European Act: Towards a New Euro-Dynamism?*, 24 J. COMMON MKT. STUD. 203, 208 (1986). Denmark, Greece and the United Kingdom objected.

21. *Completing the Internal Market: Commission White Paper to the European Council*, COM(85)310 final (June 14, 1985) (also known as the Cockfield Report) [hereinafter *Commission White Paper*]. The White Paper constituted an ambitious program of economic integration initially built upon 310 specific pieces of legislation intended to eliminate existing physical, technical and fiscal barriers to the internal market. The Commission envisaged two principal kinds of measures to complete the market: harmonization legislation and the mutual recognition of national standards. For each item, the White Paper projected a date between 1985 and 1992 for Commission proposal and Council enactment. The net effect of additions, deletions and consolidations to the program between 1985 and 1988 has been to reduce the total number of legislative actions required for completion of the internal market to 279 as of November 1988. Commission of the European Communities, *Completing the Internal Market: An Area Without Internal Frontiers/The Progress Report Required by Article 8B of the Treaty*, COM(88)650 final 4 (Nov. 17, 1988) [hereinafter *Commission Midterm Report*].

22. 18 BULL. EUR. COMM. (No. 3) 14 (1985). Denmark, Greece and the United Kingdom again dissented. Article 236 of the EEC Treaty does not require a unanimous vote of the Member States on the decision to hold an intergovernmental conference. See generally De Zwaan, *The Single European Act: Conclusion of a Unique Document*, 23 COMMON MKT. L. REV. 747, 750-51 (1986).

developed over the previous fifteen years on a mostly informal and intergovernmental basis, and 2) achieving agreement on specific amendments to the EEC Treaty reflecting the combination of modest institutional and programmatic changes that the Dooge Committee, the Commission, and certain national delegations appeared to support. By early December, the Conference had reached a consensus on most substantive matters and shortly thereafter the foreign ministers agreed to deal in a single text with both the status of European political cooperation and the amendments to the Community treaties. That decision, intended to demonstrate the linkage between these two approaches to Community reform, ultimately gave the Single European Act its name.²³

The Single European Act was opened for signature on February 17, 1986. Most of the Member States promptly signed the treaty, but Denmark, Greece and Italy waited until a special Danish referendum on the matter had been approved. Ratification by all of the Member States followed within the year, and the Act entered into force on July 1, 1987.²⁴

II. THE CENTERPIECE: COMPLETION OF THE INTERNAL MARKET

The central programmatic feature of the Single European Act is its goal of completing the European Community's internal market by December 31, 1992.²⁵ In emphasizing functional economic

23. See SEA, *supra* note 1, art. 1, para. 1 ("The European Communities and European Political Cooperation shall have as their objective to contribute together to making concrete progress towards European unity."). The Commission previously had urged that all changes be dealt with in the same text. De Zwaan, *supra* note 22, at 753.

24. The effective date of the Act, originally January 1, 1987, had to be postponed due to a challenge in the Irish courts to the constitutionality of Ireland's ratification. The Irish Supreme Court eventually ruled that Title III of the Single European Act—the provisions on European political cooperation—could not be ratified without a national referendum. *Crotty v. An Taoiseach & Others*, 7 I.L.R.M. 400, [1987] 2 Comm. Mkt. L.R. 666 (Ir. S.C. 1987). A May 1987 referendum resulted in a constitutional amendment permitting ratification. See Lang, *The Irish Court Case which Delayed the Single European Act: Crotty v. An Taoiseach and Others*, 24 COMMON MKT. L. REV. 709 (1987); Sherlock, *Constitutional Law: Sovereignty, the Constitution and the Single European Act*, 9 DUBLIN U.L.J. 101 (1987).

The term "Final Act" refers to the official communication of the Single European Act by the inter-governmental conference that produced it. *Final Act of the Conference of the European Communities' Member States*, 30 O.J. EUR. COMM. (No. L 169) 20 (1987), reprinted in 25 I.L.M. 504 (1986) [hereinafter *Final Act*]. The significance of the Final Act lies in the fact that it conveys by way of annex a series of declarations to the Single European Act, the first eleven of which were adopted by the intergovernmental conference upon signature of the text and the remaining nine of which were interposed by certain institutions or Member States and only "noted" by the conference in the Final Act.

25. EEC Treaty, *supra* note 2, art. 8A, added by SEA, *supra* note 1, art. 13. On the legal effect of the deadline for completion of the internal market, see *infra* note 90.

integration, the Member States essentially followed the approach advanced by the Commission in its December 1985 White Paper.²⁶ Nevertheless, considering that the creation of a common market figured among the Community's original and most central objectives, one may ask what more is meant by the new internal market program. The amended Treaty itself refers only to the establishment by 1992 of "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."²⁷ This vague formulation prompted former Judge Pescatore of the European Court of Justice to describe the 1992 deadline as an anticlimactic prolongation of the transitional period for achieving the Community's original goals.²⁸

In its attempt to complete the internal market, the Single European Act merits a more favorable evaluation. It is no secret that on its thirtieth anniversary the Community still had not fully removed all physical, technical and fiscal barriers to trade. Physical barriers, mostly in the shape of border formalities, have not been dismantled because certain customs and fiscal operations, safeguard measures, and Member State policing of terrorist and other illicit activities continue to be allowed.²⁹ Technical barriers to intra-Community trade refer to the restraints on the free movement of goods caused by differences among national regulatory standards. The removal of these nontariff barriers has been gradual and incomplete due to the slow

26. See *supra* note 21 and accompanying text. The December 31, 1992 target date was drawn from the Commission's White Paper as well.

27. EEC Treaty, *supra* note 2, art. 8A, added by SEA, *supra* note 1, art. 13. Timely progress toward completion of the internal market was to be monitored through reports submitted by the Commission to the Council by December 31, 1988 and December 31, 1990. *Id.* art. 8B, added by SEA, *supra* note 1, art. 14. For the 1988 report, see *Commission Midterm Report*, *supra* note 21. That report was preceded by three annual progress reports on the internal market program. Commission of the European Communities, *First, Second and Third Reports from the Commission to the Council and the European Parliament on the Implementation of the Commission's White Paper on Completing the Internal Market*, COM(86)300 final (May 26, 1986), COM(87)203 final (May 11, 1987), COM(88)134 final (March 21, 1988) (respectively) [hereinafter *First, Second and Third Commission Report*, respectively].

On the meaning of the term "internal market," see Ehlermann, *The Internal Market Following the Single European Act*, 24 COMMON MKT. L. REV. 361, 364-70 (1987).

28. Pescatore, *supra* note 19, at 11-12. See also Feld & Mahant, *supra* note 16, at 39; Forwood & Clough, *The Single European Act and Free Movement: Legal Implications of the Provisions for the Completion of the Internal Market*, 1986 EUR. L. REV. 383 (1987).

29. Member State border controls also collect data on trade flow within the Community. An example of recent progress in eliminating physical barriers to trade was the 1988 replacement of the various national customs forms by a uniform customs form called the Single Administrative Document. 28 O.J. EUR. COMM. (No. L. 79) 1 (1985). For criticism of the Council's slowness in facilitating the free movement of persons across Member State frontiers, see Note, *The Elimination of European Community Border Formalities*, 27 VA. J. INT'L L. 369 (1987).

legislative process of harmonizing national laws and the need for case by case rulings on the conformity of national standards to directly effective³⁰ principles of free movement found in the EEC Treaty and secondary legislation.³¹ To assist both of these processes, a recent directive requires Member States to inform the Commission before introducing any new technical standards and to explain the need for them.³² Fiscal barriers, finally, are created by differences in the bases and rates of indirect taxation among the Member States and by the frontier collection process for these taxes. There are obvious limits to what the jurisprudence of the Court of Justice can do to lower these barriers, and the Community has therefore relied greatly on the slow and uncertain process of fiscal harmonization.³³ Beyond trade in goods, completion of the internal market implies a freer movement of persons, services and capital. Progress in these areas likewise depends on the Court's direct effects jurisprudence and on the positive

30. According to case law of the European Court of Justice, a provision of the EEC Treaty or of secondary Community legislation is directly effective when it confers rights upon individuals that national authorities (administrative and judicial alike) are bound to respect and enforce. To have direct effect, a Community law provision generally must be clear, precise and unconditional, and must not be subject to further measures on the part of the Member States or Community institutions, or otherwise leave them substantial discretion. The leading decision applying this direct effects doctrine is *Van Gend en Loos v. Nederlandse Tariefcommissie*, Case 26/62, 9 *Receuil* 1, [1963] *Comm. Mkt. L.R.* 105 (1963).

31. Article 30 of the EEC Treaty in particular prohibits "[q]uantitative restrictions on imports and all measures having equivalent effect . . . between Member States," subject to exceptions on various policy grounds set out in article 36 ("public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property"). EEC Treaty, *supra* note 2, arts. 30 & 36. See generally Lonbay, *The Single European Act*, 11 *B.C. INT'L & COMP. L. REV.* 31 (1988). Related obstacles to the free movement of goods identified in the White Paper include Member State procurement policies and the existence of national systems of trademark, copyright and patent protection, among others.

32. *Council Directive 83/189*, 26 *O.J. EUR. COMM.* (No. L 109) 8 (1983). With certain exceptions, the adoption of any such measures is subject to mandatory delay if either the Commission or another Member State objects to them on the ground that they impair the free movement of goods. See *infra* note 65. This same procedure has been extended from the industrial products field to the food, drugs and cosmetics fields. *Council Directive 88/182*, 31 *O.J. EUR. COMM.* (No. L 81) 75 (1988). A standing committee of Member State representatives has been set up under the directive to foster Member State dialogue on the problem of protectionist national legislation. On newer approaches to the harmonization of technical norms generally, see Waelbroeck, *L'Harmonisation des règles et normes techniques dans la CEE*, 24 *CAHIERS DE DROIT EUROPEEN [C.D.E.]* 243 (1988).

33. See *Commission White Paper*, *supra* note 21, at 41-54. The Commission has since declared the convergence of value added tax (VAT) and excise rates to be a matter of urgency. *Third Commission Report*, *supra* note 27, at 29. An example of other changes that will be necessary is the establishment of a clearing system to ensure, in the absence of fiscal frontiers, that VAT revenues are properly allocated. For a discussion of these and other post-Single Act initiatives, see Bos & Nelson, *Indirect Taxation and the Completion of the Internal Market of the EC*, 27 *J. COMMON MKT. STUD.* 27 (1988).

harmonization of national laws—the former afflicted by the inevitable defects of a rule of reason approach and the latter by the institutional impediments to the passage of Community legislation.³⁴

To the extent that the Single Act provides legally and politically effective means for remedying the Community's failure to accomplish original Treaty goals, it contributes substantially to the building of Europe. The first of these means, treated at greater length in this article under the heading of institutional reform,³⁵ involves the relatively simple expedient of changing from unanimity to qualified majority the Council of Ministers' vote required to adopt certain measures needed to complete the internal market. A rule of unanimity traditionally has made it possible for a dissenting member to block important legislation indefinitely, or to require that substantial compromises be made.³⁶ Were it not for the Single Act, much of the legislation contemplated in the Commission White Paper on the internal market would have required unanimous consent in the Council.

A. *Harmonization in Aid of the Internal Market*

The other instruments provided by the Single European Act for completing the internal market more closely mirror the Commission's specific proposal that removal of physical, technical and fiscal barriers to trade be achieved through a combination of simpler and more flexible harmonization procedures and a policy of mutual recognition of national standards.³⁷ As far as harmonization is concerned, article 100 of the original Treaty authorized the Council, acting by unanimous vote, to issue directives for the approximation of national legislation or administrative measures which would directly affect the establishment and functioning of the common market.³⁸ Rather than change the ground rules generally, the Single Act supplements the existing harmonization procedure with a new one embodied in article 100A. Article 100A takes a more relaxed attitude toward harmonization measures whose object is the establishment or functioning of the

34. See generally Edward, *supra* note 3, at 19-20; Pescatore, *supra* note 19, at 12-13. Edward emphasizes the limited progress made on freedom of services. On the other hand, the Council recently adopted a directive that, subject to a transitional period favoring the lesser developed Member States, purports to complete the liberalization of capital movements within the Community by 1990. *Council Directive 88/361*, 31 O.J. EUR. COMM. (No. L 178) 5 (1988).

35. See *infra*, Part V.

36. Hirsch, *Marché intérieur: une nouvelle impulsion grâce à l'acte unique?*, 303 REVUE DU MARCHÉ COMMUN [REV. M.C.] 1 (1987).

37. See *supra* note 21 and accompanying text.

38. EEC Treaty, *supra* note 2, art. 100.

internal market.³⁹ In the first place, legislation under article 100A may take the form of regulations or other measures, in addition to directives, as permitted under article 100.⁴⁰ More importantly, these measures may be adopted in the Council by qualified majority vote, rather than by the unanimous vote required under article 100.⁴¹

This sweeping extension of majority voting is significant in several respects. Until the Single Act, the EEC Treaty generally provided for qualified majority only in limited fields, and then only for the adoption of reasonably specific measures.⁴² Such is not the case with harmonization under article 100A, a process potentially as broad in scope as the internal market itself. Moreover, the unanimity requirement frequently slowed the process of harmonizing technical standards among the Member States since any one of the twelve Member States could prevent or delay the adoption of legislation. Qualified majority voting is specifically designed to facilitate decision-making in the Council by eliminating the possibility of blocking minorities.⁴³

While greater use of qualified majority voting was among the reformers' principal methods of promoting construction of the internal market, it was not their only method. The Commission White Paper also proposed that new legislative techniques be devised that

39. EEC Treaty, *supra* note 2, art. 100A, *added by SEA, supra* note 1, art. 18. However, article 100A may be more limited in scope of application than article 100, whose use presupposes a direct effect upon the establishment or functioning of the common market, but does not necessarily have that as its "object."

40. *Id.* One of the reasons for the extension was the poor record of certain states in implementing harmonization directives, and the corresponding advantage of using regulations that would be directly applicable in all Member States. Ehlermann, *supra* note 27, at 386. Directives, in principle, provide greater flexibility to the Member States than regulations because, according to article 189 of the EEC Treaty, they are binding in the Member States only as to the result to be achieved and leave to national authorities a choice among form and methods for their application. This is in contrast to regulations which are described as "binding in [their] entirety and directly applicable in all Member States." Although the Single Act invites the use of instruments other than directives for harmonization purposes, a fourth declaration directing the Commission to give priority to the use of directives whenever an amendment of existing Member State legislation was necessary was included in the Final Act of the intergovernmental conference that produced the Single European Act. *Final Act, supra* note 24, at 24 ("Declaration on Article 100A of the EEC Treaty").

41. EEC Treaty, *supra* note 2, art. 100A, *added by SEA, supra* note 1, art. 18. Harmonization under article 100A is specifically required to take place "in cooperation with the European Parliament," a reference to the Single Act's new legislative procedure, discussed *infra* Part V(B), as well as upon consultation of the Economic and Social Committee (ECOSOC). By contrast, Article 100 does not require in all instances the consultation either of Parliament or the ECOSOC. EEC Treaty, *supra* note 2, art. 100.

42. See generally J. DE RUYT, *L'ACTE UNIQUE EUROPEEN* 166 (1987).

43. Prior to the adoption of the Single Act, much of the harmonization legislation designed to complete the internal market would have required the unanimous approval of the Member States. *Id.* at 167.

would make adopted legislation more effective, and that improved administrative techniques be developed to enforce them. To this end, the Commission and Council have adopted a new approach to establishing Community norms that calls for mutual recognition of national standards where appropriate, as opposed to Community harmonization.⁴⁴ Moreover, when harmonization does occur, it will cover only the essential requirements on any given matter and leave to European standards bodies the task of establishing technical specifications.⁴⁵ To ensure that these measures are better respected, the Community institutions have begun promoting regular mutual recognition of various tests and certificates,⁴⁶ and have established a system of pre-adoption Commission review of most new national product standards.⁴⁷ These procedural changes, like the Single Act's new qualified

44. *Council Resolution of May 7, 1985 (85/C 136/01)*, 28 O.J. EUR. COMM. (No. C 136) 1 (1985) [hereinafter *Tech. Harmonization Res.*]. See also *Commission White Paper*, *supra* note 21, at 6, 18-23. Mutual recognition of national standards refers to a process whereby each Member State will admit products lawfully manufactured in other Member States, even though manufactured or marketed on the basis of specifications that differ from those ordinarily required under its own law, provided the foreign standards broadly satisfy the legitimate public interests of the admitting state. The Court of Justice has held that, in appropriate circumstances, the mutual recognition of national standards is a Community law imperative, even in the absence of harmonization measures on the product in question. *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, 1979 E. Comm. Ct. J. Rep. 649, [1979] 3 Comm. Mkt. L.R. 494.

Reliance on the mutual recognition of national standards, at the expense of positive harmonization, has a fashionable deregulatory flavor. In the long run, however, harmonization is more apt to create a uniform regulatory environment and produce the full advantages of a single market.

45. *Tech. Harmonization Res.*, *supra* note 44, at 1. See also *Commission White Paper*, *supra* note 21, at 18-19. Essential requirements, under the new harmonization approach, refer to those aspects of any given legislative initiative that are deemed basic or fundamental to it, rather than matters of detail. The key distinction is between principle and technical detail, and the new approach will accordingly allow the institutions to deal with larger categories of products (i.e., to legislate more generically), since the technical matters on which specific kinds of products will differ may be dealt with separately by European standards bodies. The most important standards bodies are the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (known by its French acronym CENELEC). By November 1988, four technical standards had been adopted either definitively or provisionally by the Council on the basis of the new harmonization approach, with others on the horizon. *Commission Midterm Report*, *supra* note 21, at 5.

46. See Waelbroeck, *supra* note 32, at 262-64. The directives themselves are now beginning in greater number to provide that if a product bears a certain seal or certificate of the Member State where it is produced—the accepted seals and certificates being specified in the particular directive itself—then the product will be presumed to be in conformity with that directive and will benefit from the mutual recognition principle. More specifically, the product will be exempt from controls normally attaching before it can enter another Member State's market.

47. See *supra* note 32 and *infra* note 65. By the end of 1987, the Commission had already reviewed several hundred national measures under the system and required that many of them be modified. *First Commission Report*, *supra* note 27, at 14; *Second Commission Report*, *supra* note 27, at 21; *Third Commission Report*, *supra* note 27, at 21.

majority voting provisions, are designed to promote simpler, swifter and more certain dismantling of trade barriers. Unlike voting formulas, however, these changes could be introduced without altering the Treaty framework.

Although largely procedural in character, article 100A also regulates certain substantive aspects of harmonization in the internal market program which affect the balance between the Community's interest in uniform economic regulation and the Member States' desire to safeguard important national interests. A notable example is the provision in article 100A(3) that Commission proposals for harmonizing health, safety, and environmental and consumer protection laws should seek to achieve "a high level of protection."⁴⁸ While not requiring that the Community adopt the highest existing national level of protection, article 100A(3) nevertheless enjoins the Commission to formulate harmonization standards that offer a significant level of protection. The provision is designed to reassure those states that traditionally have been more protective in these fields (for example, Denmark and West Germany) that Community harmonization measures enacted by qualified majority voting will not seriously degrade their national standards. Admittedly, the vagueness of the assurance renders it virtually unenforceable.⁴⁹ Yet it is difficult to

48. EEC Treaty, *supra* note 2, art. 100A(3), added by SEA, *supra* note 1, art. 18.

49. West Germany's proposal to the intergovernmental conference was that no harmonization measure affecting the stated values could be adopted without the assent of every Member State whose national standards would thereby be lowered. See J. DE RUYT, *supra* note 42, at 170. The West German proposal presented advantages from the point of view of enforcement, but in effect conferred a limited right of veto.

For its part, the government of Denmark upon ratification filed an eighteenth declaration to the Single European Act to the effect that article 100A permits a Member State to continue to apply national provisions if Community standards do not adequately safeguard the working or natural environment or other interests referred to in article 36 (see *supra* note 31), subject to the proviso that the national provisions not constitute disguised protectionism. *Final Act, supra* note 24, at 27 ("Declaration by the Government of the Kingdom of Denmark on Article 100A of the EEC Treaty" [hereinafter Danish Declaration]). Greece, Ireland and Portugal also filed declarations in the Final Act expressing a need to safeguard certain national interests. *Id.* at 26 ("Declaration by the Government of the Hellenic Republic on Article 8A of the EEC Treaty" on exchange rate and transport policy); *Id.* at 27 ("Declaration by the Government of Ireland on Article 57(2) of the EEC Treaty" on national insurance industry's need for protection); *Id.* ("Declaration by the Government of the Portuguese Republic on Articles 59, second paragraph, and 84 of the EEC Treaty" on free movement of aliens providing services and transport policy).

These Member State declarations, like those separately filed by the institutions, purport unilaterally to modify or enter a reservation about a particular provision of the Single Act and are probably of no legal effect. A different situation is presented by the first eleven declarations, all of which were adopted by the intergovernmental conference itself at the time the Single Act was signed and therefore may have interpretative value. For an alternative view, see Toth, *The Legal Status of the Declarations Annexed to the Single European Act*, 23 COMMON MKT. L. REV. 803 (1986).

imagine how a constitutional document such as the Single European Act could offer more protection to national interests without restoring the Member State veto. As will be discussed below,⁵⁰ the Act provides that Community legislation in the workplace safety and environmental protection fields sets minimum standards only, thus leaving individual states free to enact more stringent measures. However, to extend this principle to all harmonization efforts in the health, safety, and environmental and consumer protection fields would undermine the idea of uniformity which is closely associated with harmonization.

The Single Act not only seeks to reassure those Member States troubled by the prospect of lowered standards, but also those less economically developed states that imagine themselves unable to meet the standards that qualified majority decisionmaking will yield. Again, the Act directs the Commission to consider the varied level of economic development among the Member States when drafting its proposals.⁵¹ If the Commission provides for derogations, they are to be temporary and "cause the least possible disturbance to the functioning of the common market."⁵² Both in allowing derogations and in limiting their use, the Single Act reflects well-established Community practices.⁵³

B. Safeguards and Derogations in the New Harmonization

To assuage lingering Member State concerns that the process of harmonization by qualified majority vote might ignore legitimate national needs,⁵⁴ the Single Act's drafters introduced additional measures to safeguard these interests. As a first device, article 100A(5) expressly invites the Council "in appropriate cases" to equip its harmonization measures with safeguard clauses allowing Member States to protect their vital interests.⁵⁵ The inclusion of such clauses actually has been a common practice in the Community.⁵⁶ However, this feature of the Single Act has been strongly criticized because it affords

50. See *infra* notes 137 & 145 and accompanying text.

51. EEC Treaty, *supra* note 2, art. 8C, added by SEA, *supra* note 1, art. 15.

52. *Id.* These conditions should dispel fears that the Single Act means to install what has come to be called a "two-speed" Europe. See Ehlermann, *supra* note 27, at 375 (citing the author's earlier article, *How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds,"* 82 MICH. L. REV. 1274 (1984)).

53. Glaesner, *supra* note 16, at 296.

54. As insular nations, the United Kingdom and Ireland were keenly interested in obtaining protection in the areas of plant and animal health. On the special concerns of Denmark, see Gulmann, *The Single European Act: Some Remarks from a Danish Perspective*, 24 COMMON MKT. L. REV. 31 (1987); Worre, *Denmark at the Crossroads: The Danish Referendum of 28 February 1986 on the EC Reform Package*, 26 J. COMMON MKT. STUD. 361 (1988).

55. EEC Treaty, *supra* note 2, art. 100A(5), added by SEA, *supra* note 1, art. 18.

56. See Glaesner, *supra* note 16, at 297.

Member States convenient opportunities to deviate from harmonization measures enacted under article 100A, and tends by its very nature to compromise the element of uniformity in harmonization.⁵⁷ To prevent abuse of these clauses, the Single Act provides that Member States may invoke a safeguard clause only on a provisional basis, only in order to protect certain noneconomic national interests, and only subject to "a Community control procedure."⁵⁸ In the final analysis, these safeguard clauses pose no greater threat to the integrity of the internal market than do article 36 of the original treaty (the regime governing permissible Member State restrictions on the free movement of goods) and the voluminous case law on nontariff barriers to trade that has emerged under that provision.

The real controversy surrounding article 100A has been generated not by the fairly traditional mechanism for meeting the needs of minority states embodied in article 100A(5), but by article 100A(4).⁵⁹ This article enables Member States unilaterally to derogate from harmonization measures adopted by a qualified majority of the Council by applying nonconforming national laws, providing they do so in order to protect either the "major needs" referred to in Treaty article 36⁶⁰ or the natural or workplace environment.⁶¹ Article 100A(4) presents real opportunities for protectionist abuse, especially insofar as it leaves Member States free to decide for themselves, at least initially, whether deviation from Community standards is warranted.

Through a combination of political and legal review, the Single Act attempts to minimize the risk that the Member States will abuse

57. Pescatore, *supra* note 19, at 12.

58. EEC Treaty, *supra* note 2, art. 100A(5), *added by SEA, supra* note 1, art. 18. The permissible bases parallel those set out in article 36 of the EEC Treaty concerning exceptions to the rule eliminating quantitative restrictions on the free movement of goods or measures having equivalent effect. For the grounds for exceptions, see *supra* note 31.

59. EEC Treaty, *supra* note 2, art. 100A(4), *added by SEA, supra* note 1, art. 18.

60. See *supra* note 31.

61. EEC Treaty, *supra* note 2, art. 100A(4), *added by SEA, supra* note 1, art. 18. The unilateral derogation, being limited to harmonization done through qualified majority, has no application to measures adopted under article 100. This seems logical, because the requirement of unanimity under article 100 should protect the interests of minority states. On the other hand, the wording of article 100A(4) suggests that any Member State may make a unilateral derogation from an article 100A harmonization measure. Thus, the privilege of making such a derogation is not confined to a Member State that originally voted against the measure. See Greenwood, *Comment, Constitutional Reform in the EEC*, 46 CAMBRIDGE L.J. 1, 2 (1987). This view finds support in Court of Justice case law to the effect that a Member State may seek annulment of a Council act under article 173 even though it was among those that voted for the act in the first place. *Italy v. Council*, Case 166/78, 1979 Eur. Comm. Ct. J. Rep. 2575, [1981] 3 Comm. Mkt. L.R. 770. Ehlermann, however, argues as a policy matter that only those states that were outvoted at the time of a measure's adoption need or deserve the opportunity to invoke article 100A(4) to avoid its effect. Ehlermann, *supra* note 27, at 394-95.

article 100A(4). Any Member State invoking article 100A(4) must notify the Commission of that fact, thereby enabling the Commission to determine whether the derogation constitutes arbitrary discrimination or a disguised restriction on Member State trade,⁶² concepts whose meaning the Court of Justice has amply clarified in the context of article 36. If the Commission refuses to "confirm" the measure, the Member State presumably may not enforce it,⁶³ although the Commission's refusal should be open to challenge in the Court of Justice through the usual channels.⁶⁴ It remains unclear whether a Member State may apply nonconforming national measures under article 100A(4) pending Commission review or upon the Commission's failure to act. The more reasonable view is that such measures should not be applied until the Commission has actually confirmed them.⁶⁵ Thus, if national measures are applied prematurely, the Commission or any other Member State may seek review directly in the Court of Justice, without following the usual preliminary procedures of articles 169 and 170.⁶⁶ To evaluate the merits of a derogation, the Commission and the Court will presumably apply the jurisprudence of article 36, including the general principle of proportionality,⁶⁷ as

62. EEC Treaty, *supra* note 2, art. 100A(4), added by SEA, *supra* note 1, art. 18.

63. Glaesner, *The Single European Act: Attempt at an Appraisal*, 10 FORDHAM J. INT'L L. 446, 464 (1987).

64. *Id.* See also EEC Treaty, *supra* note 2, art. 173. For a different and distinctly minority view on the necessity of Commission confirmation, see the Danish Declaration, *supra* note 49.

65. This interpretation would be in keeping with a directive enacted in 1983 on the subject of technical barriers to trade. Council Directive 83/189, *supra* note 32, at 8. See *supra* note 32 and accompanying text. This directive bars Member States from introducing new technical standards without first notifying the Commission and thus giving the Commission and other Member States an opportunity to object. Any such objection would require the state to delay adoption of the draft measure until the Commission reaches a final determination. For sharply contrasting views on the necessity of awaiting Commission confirmation under the new article 100A(4) procedure, compare Gulmann, *supra* note 54, at 38-39, with Flynn, *How Will Article 100A(4) Work? A Comparison with Article 93*, 24 COMMON MKT. L. REV. 689, 698-701 (1987). See generally J. DE RUYT, *supra* note 42, at 172.

Ehlermann takes the view that paragraph 4 may only be invoked at a time prior to implementation of the harmonization measure. If that is correct, the question of the interim effectiveness of nonconforming national measures does not arise. Ehlermann, *supra* note 27, at 395, 397-98.

66. EEC Treaty, *supra* note 2, art. 100A(4), added by SEA, *supra* note 1, art. 18. This provision enables the Commission or any Member State to challenge measures taken under article 100A directly in the Court of Justice without complying with the usual notice provisions of Treaty articles 169 and 170.

67. See e.g., *Denkavit Futtermittel GmbH v. Minister für Ernährung, Landwirtschaft und Forsten des Landes N.R.W.*, Case 251/78, 1979 E. Comm. Ct. J. Rep. 3369, [1980] 3 Comm. Mkt. L.R. 513. The principle of proportionality, applied in this context, should cause the Commission and the Court to sustain a Member State derogation only to the extent the latter is shown to be necessary for achieving the legitimate national needs invoked. See also Glaesner, *supra* note 63, at 463.

well as the more specific notion that Member State derogations are unwarranted if existing measures reasonably protect an asserted national interest.⁶⁸

In sum, the drafters of the Single Act evidently included derogation provisions and safeguard clauses in article 100A in order to secure Member State support for a regime of qualified majority voting on much of the internal market legislation still needed. The drafters also placed their confidence in the willingness and ability of the Community to curb Member State abuses of the article 100A privileges by tolerating only narrowly tailored derogations that would satisfy the Court's accepted standards of review. In these ways they sought to accelerate legislative construction of the internal market without ultimately jeopardizing respect for its most fundamental principles. However, the framers' logic sacrifices somewhat the principle of uniformity associated with harmonization. This situation could prompt the Council to include a safeguard clause in harmonization measures pursuant to article 100A(5), even when it otherwise would not do so, on the theory that the clause will bar Member States from making unilateral derogations under article 100A(4).⁶⁹ The Council may also use article 100, the EEC Treaty's original harmonization procedure, rather than article 100A.⁷⁰ Although article 100 requires unanimity for the adoption of harmonization directives, it does not authorize Member States to take unilateral protective action. In the final analysis, however, the framers were willing to place uniformity at risk in exchange for increased qualified majority voting. It is also possible that the framers viewed the Member States' acceptance of the article 100A(4) unilateral derogation procedure as an implied waiver of their right to invoke the political veto provided for in the

68. *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, 1979 E. Comm. Ct. J. Rep. 649, [1979] 3 Comm. Mkt. L.R. 494. On this jurisprudence, see *supra* note 44.

69. For endorsements of the stated theory, see Glaesner, *supra* note 16, at 297; Labouz, *L'Acte unique européen*, 3 REVUE QUEBECOISE DE DROIT INTERNATIONAL [R.Q.D.A.] 133, 157-58 (1986). For the opposite view, see Ehlermann, *supra* note 27, at 399 n.59. Actually neither the Single European Act nor its negotiating history reveals a clear intent either way. According to one commentator, the coexistence of paragraphs 4 and 5 of article 100A is an inadvertence, and the latter provision (which actually was negotiated earlier in time) ought to have been discarded when the former was included. J. DE RUYT, *supra* note 42, at 171.

70. However, it has been argued that article 100, being a general harmonization provision, is not a proper basis for measures that are capable of adoption under the more specific instrument of article 100A. See Ehlermann, *supra* note 27, at 382. In any case, it would be wrong to assume that use of article 100 necessarily would yield the same harmonization measure as article 100A. As is well known, the process of reaching common consent often entails compromises of substance. See *supra* note 36 and accompanying text.

Luxembourg Accords.⁷¹

C. *The Mutual Recognition of Standards*

The Single European Act facilitates construction of the internal market not only through legislation that actually harmonizes national laws,⁷² but also through the closely related process of mutual recognition of standards.⁷³ Article 100B of the amended Treaty directs the Commission during the year 1992 to compile an inventory of all national legislative or administrative measures which have not yet been harmonized, but whose harmonization would advance the completion of the internal market.⁷⁴ Upon proposal by the Commission and using the same procedures as under article 100A, the Council may decide anytime before the end of 1992 that each Member State will be bound, with respect to specified matters within that inventory, to treat the provisions in force in the other Member States as equivalent to its own.⁷⁵ Council decisions taken under article 100B are intended to prevent a Member State from barring community trade on account of noncompliance with domestic standards. In addition to giving the Council yet another legislative instrument for eliminating nontariff barriers to trade, this mutual recognition of standards, or constructive as opposed to actual harmonization of national laws, should serve as a warning to the Member States that if they do not vote to harmonize national measures under article 100A, they may be bound to accept the national standards of every other Member States as equivalent in effectiveness to their own.⁷⁶ The

71. For this view, see Ehlermann, *supra* note 27, at 392. On the Luxembourg Accords and their future under the Single European Act, see *infra* Part V(C).

72. See *supra* notes 38-41 and accompanying text.

73. In its 1985 White Paper, the Commission advocated both harmonization and mutual recognition as means to establish the internal market. *Commission White Paper*, *supra* note 21, at 19, 21. Here, mutual recognition deals with substantive standards such as nontariff barriers. The process described in this part is one that can be resorted to when no actual harmonization measure has been adopted. It is a means by which products can be declared in presumptive conformity with the product standards of any state into which entry is sought, without any actual harmonization measure on the subject ever having been adopted.

74. EEC Treaty, *supra* note 2, art. 100B(1), *added by* SEA, *supra* note 1, art. 19.

75. *Id.* art. 100B(1), para. 2 & art. 100B(3). The Council will presumably be free to select from the inventory those provisions it believes are suitable for mutual recognition of this sort.

76. However, a fifth declaration annexed by the intergovernmental conference to the Single European Act remarks that article 8C of the amended EEC Treaty, which contemplates temporary derogations for Member States experiencing special difficulties, has general application and is therefore applicable to measures taken under article 100B. *Final Act*, *supra* note 24, at 24 ("Declaration on Article 100B of the EEC Treaty"). In addition, article 100B(2) expressly incorporates by analogy the unilateral derogation procedure set out in article 100A(4). EEC Treaty, *supra* note 2, arts. 100A(4) & B(2), *added by* SEA, *supra* note 1, arts.

Single Act's constructive harmonization procedure clearly is not as potent an instrument as the automatic equivalence that the Commission originally sought.⁷⁷ Affirmative action by the Council, if only in the form of a declaration of equivalence, is still required. On the other hand, article 100B presents the distinct advantage over article 100A of dispensing with what can be a long and arduous political debate over the precise terms of a harmonization measure. It is an imaginative and useful device, and probably capable of far-reaching effects.

D. The Scope and Limits of the New Harmonization

The Member States ultimately chose to limit the scope of application of articles 100A and 100B. For example, they excluded the entire field of fiscal harmonization,⁷⁸ though they did commit themselves in principle to undertake whatever fiscal harmonization might be necessary for completion of the internal market.⁷⁹ Likewise, they

18 & 19. It seems reasonable to assume that safeguard clauses, such as article 100A(5) invites, are also welcome under article 100B.

77. The Commission originally proposed that if harmonization of national laws had not been accomplished by the end of 1992, each Member State at that time would become automatically bound, without any action by the Council, to treat the relevant provisions of every other Member State affecting the free movement of persons, goods, services and capital as equivalent to its own. See J. DE RUYT, *supra* note 42, at 158; Jacqu , *L'Acte unique europ en*, 22 REVUE TRIMESTRIELLE DE DROIT EUROPEEN [REV. TRIM. DR. EUR.] 575, 598 (1986). Among the drawbacks of that approach is the incentive it might give to less protective states to resist positive efforts at harmonization in the expectation that, starting in 1993, their standards, however low, would be deemed equally protective as those of the other Member States.

Article 47 of the Draft Treaty of European Union had specified a series of internal market deadlines: two years for provisions affecting persons and goods, five years for those affecting services, and ten for those affecting capital. The drafters may have intended to give those deadlines direct effect, but they were not explicit. *Draft Treaty*, *supra* note 5, art. 47.

78. EEC Treaty, *supra* note 2, art. 100A(2), added by SEA, *supra* 1, art. 18. The Commission initially proposed that any fiscal harmonization necessary to the establishment or functioning of the internal market be a proper subject of harmonization by qualified majority, but the Member State reaction was uniformly negative, mostly on account of traditional state sovereignty in matters of national economic and budgetary policy. See J. DE RUYT, *supra* note 42, at 164; Ehlermann, *supra* note 27, at 380-81.

79. EEC Treaty, *supra* note 2, art. 99, amended by SEA, *supra* note 1, art. 17. Article 99, as amended, requires the Council (voting unanimously upon Commission proposal, and after consulting the European Parliament) to take the necessary harmonization measures on turnover taxes, excise duties and other forms of indirect taxation before the end of 1992. The amendment's deletion from article 99 of its original reference to articles 100 and 101 implies that the procedures set out in article 99 are now exclusive. As far as article 100 goes, this is not a serious loss since it too requires unanimity. See *supra* note 38 and accompanying text. Article 101, on the other hand, would have allowed the Council by qualified majority vote to take action to eliminate differences among national laws that cause distortions in competition. EEC Treaty, *supra* note 2, art. 101. To the extent that it bars resort to article 101 for purposes of fiscal harmonization, the Single Act makes the process more difficult.

declared that measures concerning the free movement of persons⁸⁰ and the treatment of employees⁸¹ would not be subject to actual or constructive harmonization by qualified majority.⁸² Finally, the Member States reserved the right to take unilateral measures to control immigration from third countries, and to combat terrorism, crime, drug trafficking and illicit trade in art.⁸³ While these exclusions and reservations may seem needless in view of the more general safeguards already attached to articles 100A and 100B, they should not be viewed with alarm. Assuming that the Single Act's introduction of new instruments for completion of the internal market neither prejudices the application of unamended provisions of the EEC Treaty⁸⁴ nor weakens the force of existing common market commitments,⁸⁵ then these limitations do not seriously detract from the Single Act's commitment to create a Europe without internal frontiers.

Other aspects of the new internal market program, such as the safeguard clause and derogation provisions built into article 100A and the designation of 1992 as the deadline for completion of the market, seem more problematic when judged by their continuity with established principles of Community law.⁸⁶ However, even these features

80. EEC Treaty, *supra* note 2, art. 100A(2), *added by SEA, supra* note 1, art. 18. Exclusion of the free movement of persons was prompted by a desire to preserve national sovereignty in the handling of terrorism, international crime and international drug trafficking. Ehlermann, *supra* note 27, at 366-67.

Despite this general exclusion, the Single Act specifically makes certain aspects of the free movement of persons subject to regulation by qualified majority instead of unanimous vote, as was previously the case. EEC Treaty, *supra* note 2, arts. 57(2) & 59, para. 2, *amended by SEA, supra* note 1, arts. 16(2) & (3).

81. EEC Treaty, *supra* note 2, art. 100A(2), *added by SEA, supra* note 1, art. 18. The reasons for and dimensions of this exclusion, apparently sought in the negotiations by the United Kingdom, are unclear. J. DE RUYT, *supra* note 42, at 169.

82. The exclusion of these matters from the field of harmonization by qualified majority vote means that any regulation must be based on other available treaty provisions (including articles 100 and 235 of the EEC Treaty).

83. *Final Act, supra* note 24, at 25 ("General declaration on Articles 13 to 19 of the Single European Act"). See generally Glaesner, *supra* note 16, at 292-93. However, in the thirteenth declaration the Member States pledged to cooperate in these same efforts. *Final Act, supra* note 24, at 26 ("Political declaration by the Governments of the Member States on the free movement of persons").

84. EEC Treaty, *supra* note 2, art. 8A, *added by SEA, supra* note 1, art. 13.

85. See generally Brown, *Reforms in the EEC's Legislative Process: The Single European Act and its Practical Implications*, 32 J.L. SOC. SCOTLAND 336, 337 (1987); Ehlermann, *supra* note 27, at 369; Glaesner, *supra* note 16, at 292; Jacqu , *supra* note 77, at 598.

86. For example, the Court of Justice has ruled that article 36 of the EEC Treaty may not be invoked by a Member State to avoid the direct effects of the free movement principle stated in article 30 once a relevant harmonization measure has intervened. *Denkavit Futtermittel GmbH v. Minister f r Ern hrung, Landwirtschaft und Forsten des Landes N.R.W.*, Case 251/78, 1979 E. Comm. Ct. J. Rep. 3369, 3388-89, [1980] 3 Comm. Mkt. L.R. 513, 536-37. Article 100A(4) plainly compromises this principle when it permits Member States to claim derogations from harmonization measures on certain noneconomic grounds. EEC

of the Single Act ultimately do not impair the *acquis communautaire*.⁸⁷ As previously indicated,⁸⁸ the framers of the Single Act viewed the safeguard and derogation provisions of article 100A as narrow concessions required in order to win the Member States' acceptance of wider qualified majority voting. The 1992 deadline, on the other hand, was not intended to prolong the original transition period for accomplishing the program set out as such in the EEC Treaty,⁸⁹ and should not be interpreted as doing so. The deadline was also not intended to justify a failure to give direct effect to Treaty provisions and to secondary Community legislation where appropriate under settled Court of Justice jurisprudence.⁹⁰ On the contrary, the Single Act assumes the validity of these principles and concentrates instead on facilitating the process by which the Community can adopt the legislation needed to eliminate the remaining nontariff barriers to trade. This is not to suggest that the Court's integrationist jurisprudence in the free movement area⁹¹ has become outmoded.

Treaty, *supra* note 2, art. 100(4), *added by SEA, supra* note 1, art. 18. However, it does not alter the otherwise general rule barring recourse to article 36 to avoid the direct effect of article 30 once harmonization has occurred. *See generally* J. DE RUYT, *supra* note 42, at 174.

87. The term "*acquis communautaire*" refers to the assembled body of legal principles, largely developed by the European Court of Justice, that help ensure the integrity, supremacy and effectiveness of the Community legal order. *See* J. BOULOUIS, *DROIT INSTITUTIONNEL DES COMMUNAUTÉS EUROPÉENNES* 152 (1984), and cases cited therein.

88. *See supra* note 69 and accompanying text.

89. *See* Murphy, *supra* note 3, at 252-53. *But see* McElhenny, *The United Kingdom, Ireland and the Single European Act: Its Origins and Implications*, 39 NO. IRE. LEGAL Q. 54, 61-62 (1988).

90. Ehlermann, *supra* note 27, at 372, 400-01. Ehlermann makes special reference to the direct effectiveness of articles 30, 52 and 59 of the EEC Treaty. *But see* McElhenny, *supra* note 89, at 54.

A certain amount of confusion has been caused by the third declaration of the Luxembourg intergovernmental conference to the effect that expiration of the December 31, 1992 deadline set out in the Single Act is to be without automatic legal effect. *Final Act, supra* note 24, at 24 ("Declaration on Article 8A of the EEC Treaty," para. 2). This declaration simply guards against the unlikely circumstance that the Court of Justice or Member State courts will extend the direct effects doctrine, *see supra* note 30, to the Single Act's call for adoption by the end of 1992 of the measures required to complete the internal market. It leaves responsibility for timely completion of the internal market in the hands of the appropriate political institutions.

On the other hand, the internal market section of the Single Act preserves the direct effect that may be fairly attributed to the various provisions of the original Treaty under Court of Justice case law, when it states that it is "without prejudice to the other provisions of [the] Treaty." EEC Treaty, *supra* note 2, art. 8A, *added by SEA, supra* note 1, art. 13. In addition, the Single Act leaves open the possibility of an action in the Court of Justice against the Council under article 175 of the Treaty for its failure to act. Thus, to say the internal market commitment is without legal effect is something of an overstatement.

91. This jurisprudence is most accurately reflected in the *Cassis de Dijon* line of cases. *See e.g.*, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, 1979 E. Comm. Ct. J. Rep. 649, [1979] 3 Comm. Mkt. L.R. 494; *Procureur du Roi v. Dassonville*,

Whatever the volume of Community legislation that intervenes, there will be occasion and need to give direct effect to article 30 and other fundamental free market provisions of the EEC Treaty. But if the new legislative instruments work as planned, this jurisprudence will need to be relied upon less often to translate common market mandates into common market realities.

The Commission's several progress reports on completion of the internal market suggest that the program thus far has met with qualified success.⁹² By the end of 1988, the Commission had submitted proposals for over ninety percent of the measures set out in its 1985 White Paper, and the Council had adopted about one-third of the legislative program envisaged.⁹³ Although Community institutions (particularly the Council, and to a much lesser extent Parliament) are still behind schedule, and in some cases have produced less progressive legislation than the Commission had contemplated,⁹⁴ in many areas they are not far from original goals. Significantly, the Commission has concluded that the generally improved performance of the institutions in 1987 and 1988 when compared to the two previous years⁹⁵ is due in part to the greater use of qualified majority voting resulting from the Single European Act's entry into force in mid-1987.⁹⁶ It is probably no coincidence that fiscal harmonization, the principal area in the internal market program that remains subject to a rule of una-

Case 8/74, 1974 E. Comm. Ct. J. Rep. 837, [1974] 2 Comm. Mkt. L.R. 436. On this jurisprudence, see *supra* notes 44 & 68 and accompanying text.

92. See *supra* note 27. The November 1988 midterm report described progress as satisfactory overall, but "patchy." *Commission Midterm Report*, *supra* note 21, at 5. The areas showing the most positive results at midterm include harmonization of technical standards, free movement of certain services (notably insurance and banking) and of capital, development of a single transport market, liberalization in public procurement, and the mutual recognition of professional qualifications and diplomas. In several of these areas, especially in the last two named, progress is still only partial.

For areas in which the Commission considers the results to date to be unsatisfactory, see *infra* notes 94, 97 & 98 and accompanying text.

93. *Commission Midterm Report*, *supra* note 21, at 4. The figure for Council action rises to forty percent if the Council's adoption of provisional measures, in the form of a "common position," is included. See *infra* note 235 and accompanying text.

94. The clearest examples are the measures taken to promote the free movement of persons across Member State borders. See *Commission Midterm Report*, *supra* note 21, at 23.

95. The Commission's first two progress reports revealed a significant backlog in the proposal and especially the enactment of internal market legislation. The third and midterm reports, both issued in 1988, offered more positive assessments. See *supra* notes 21 & 27.

96. Although the Commission credits qualified majority voting with advancing the internal market program, it is somewhat more guarded in its assessment of the Single Act's new parliamentary cooperation procedure for the enactment of legislation, discussed *infra* Part V(B), and highly disappointed by the Council's failure to increase delegations to the Commission as promised by the Act. See *infra* notes 185-186 and accompanying text.

nimity in the Council, has shown little progress.⁹⁷ On the other hand, progress has also been slow in certain areas subject to qualified majority decisionmaking.⁹⁸ This should serve as a reminder that institutional modifications alone do not assure quick success on difficult and important policy questions. Throughout its reports, the Commission has reiterated the fairly obvious point that timely completion of the internal market will require not only a general political will favoring the change, but also a readiness on the part of the Member States to translate that political will into "positive tangible results."⁹⁹ Moreover, establishing the internal market in practice as well as in law will require a better record of compliance with Council directives and Court of Justice pronouncements than certain Member States have shown in the past.¹⁰⁰

By focusing on the programmatic task of completing the internal market, the drafters of the Single European Act have eschewed grand strategies for political reform, such as Parliament's Draft Treaty, and adopted instead the wise and time-honored strategy of building Europe through concrete functional achievements. This choice reflects the Member States' unreadiness to support reforms that are based overtly on political as opposed to economic integration. It is true that the mechanisms adopted by the Single Act for furthering European economic integration fall short of those the Commission had wanted.¹⁰¹ Nevertheless, the centerpiece of Community reform, however much it has been shaped to satisfy Member State preoccupations, remains the internal market and the instruments for achieving it.

Alongside its internal market agenda, the Single Act advances two other goals both of which reflect a distinctly more political approach to Community-building: an expansion of Community competence and institutional reform. The evaluation of these efforts which follows demonstrates that, despite the attention devoted to

97. *Commission Midterm Report*, *supra* note 21, at 7, 9.

98. As of 1988, significant lack of progress was reported in the areas of plant and animal health, elimination of border formalities affecting the free movement of persons, and the right of residence of nonworking Community nationals in all Member States. *Id.* at 7-8. Progress reportedly has also been slow in establishing Community patents and trademarks. *Id.* at 21.

99. *See, e.g., Second Commission Report*, *supra* note 27, at 24.

100. The Commission's strategy of relying more heavily than before on the Member States' duty of mutual recognition of reasonably equivalent national standards (*see supra* note 44 and accompanying text) only heightens the importance of their faithful compliance with Community law principles.

101. Ehlermann, *supra* note 27, at 403-04. Most disappointing to the Commission were the unilateral derogation option, the exclusions from qualified majority harmonization, the denial of legal effect to the 1992 deadline, and the nonautomatic character of harmonization under article 100B.

them on the face of the Act and in the lengthy discussions preceding it, they are ultimately secondary in importance to the completion of the internal market.

III. THE PERIPHERY: NEW COMPETENCES FOR THE COMMUNITY

Judging by the rubrics that it adds to the Treaty of Rome, the Single European Act seems to represent an important expansion in Community competence. The pertinent amendments expressly empower the institutions to take action in the spheres of economic and monetary policy,¹⁰² regional development,¹⁰³ worker safety and health,¹⁰⁴ protection and improvement of the environment,¹⁰⁵ and scientific and technological development.¹⁰⁶ With the exception of monetary policy, the drafters of the original Treaty did not meaningfully address these policy areas. In bringing these matters within the Treaty's purview, the Member States appear finally to have committed themselves to a significant expansion of Community-wide social and economic policymaking.

Upon closer examination, however, the impression of an enlarged and strengthened Community competence proves somewhat misleading. In the first place, the drafters of the Single Act did not extend the Community sphere as broadly as discussions preceding the Act suggested they might.¹⁰⁷ Moreover, the provisions they did add are of questionable significance. In certain areas, the Single Act lends a programmatic and procedural detail that will be instructive to the institutions. However, on others it simply ratifies assumptions that the Commission and Council had long made about the scope of the Community's implied powers. In a few respects, the Single Act may actually make it less probable that the institutions will act on the matters addressed.

In the final analysis, the Single European Act contributes to action within the new Community spheres mostly as an incident of the Act's other initiatives. For example, by expanding the rule of qualified majority voting in the Council, the Single Act enhances the

102. EEC Treaty, *supra* note 2, art. 102A, *added by* SEA, *supra* note 1, art. 20.

103. *Id.* art. 130A-E, *added by* SEA, *supra* note 1, art. 23.

104. *Id.* art. 118A-B, *added by* SEA, *supra* note 1, art. 21.

105. *Id.* art. 130R-T, *added by* SEA, *supra* note 1, art. 25.

106. *Id.* art. 130F-Q, *added by* SEA, *supra* note 1, art. 24.

107. The Dooge Committee Report, *supra* note 18, had called for express Community competence in such areas as energy policy, cultural life, unemployment policy and labor relations. The Commission recommended consumer protection as a sphere of Community activity. *Commission White Paper*, *supra* note 21, at 8. France favored a broadly conceived "European social space" (*un espace social européen*). See Jacqué, *supra* note 77, at 602.

likelihood of progress in these areas, as in others. In most cases, the only bases for action previously available in these fields were the EEC Treaty's article 235 (the implied powers provision) and article 100 (the harmonization provision), both of which required the Council's unanimous consent.¹⁰⁸ However, the turn toward qualified majority voting clearly has more to do with the Single Act's strategy of advancing the internal market through simpler harmonization,¹⁰⁹ and its strategy of institutional reform,¹¹⁰ than with a conscious shift in policymaking competence from the national to the Community level. Viewed as a whole, the new substantive chapters added to the EEC Treaty more closely resemble a set of legislative priorities than a constitutional expansion of federal power.

A. *Economic and Monetary Cooperation*

The Treaty of Rome originally contemplated not only the creation of a common market but also the progressive approximation of Member State economic policies and the harmonious development of economic activities within the Community.¹¹¹ It specified coordination of monetary policy as one means of achieving these objectives.¹¹² Nevertheless, compared to the treatment accorded other Community policies, the Treaty provisions on economic and monetary policy were conspicuously vague, both substantively and procedurally. In reality, a proper transfer to the Community of legislative competence in the monetary sphere has yet to occur. As a result, virtually all tangible progress made in the sphere of monetary policy—whether the launching of the European Monetary System [EMS],¹¹³ the creation of the

108. After the Single European Act, the implied powers provision in article 235 is probably no longer available as a basis for Community action in furtherance of the internal market. This is so because it should only be applied when no other Treaty article specifically provides the Community with the legislative authority to achieve its objectives. EEC Treaty, *supra* note 2, art. 235 ("If action by the Community should prove necessary to attain . . . objectives of the Community and this Treaty has not provided the necessary powers . . ."). It may also be that article 100, the Treaty's general harmonization provision, has no application to matters that fall under article 100A, the Single Act's more specific instrument for harmonization in aid of the internal market. See *supra* note 39 and accompanying text.

109. See *supra* notes 39-41 and accompanying text.

110. See *infra* Part V.

111. EEC Treaty, *supra* note 2, art. 2.

112. *Id.* art. 105(2).

113. *Resolution of the European Council of Dec. 5, 1978*, 11 BULL. EUR. COMM. (No. 12) 10 (1978) [hereinafter *EMS Res.*]. The action taken at Brussels built directly upon the conclusions of an earlier European Council meeting of July 1978 held at Bremen. *The Results of the European Council in Bremen*, 11 BULL. EUR. COMM. (No. 6) 17-18 (1978). The European Monetary System (EMS) refined an earlier program of monetary coordination ("the serpent in the tunnel") agreed upon among the Ministers of Finance and the governors of the central banks of the original six Member States in the early 1970's. *European Monetary System*, 11

European Currency Unit [ECU],¹¹⁴ or the various agreements among central banks on the operation of these systems¹¹⁵—has occurred through the intergovernmental political process. Even the institutionalization of these accomplishments within the Community legal framework, initially scheduled for 1980, was deferred by the European Council until an unspecified future date.¹¹⁶ For its part, the more ambitious enterprise of a comprehensive economic and monetary union, first announced in 1969, yielded some early results but ultimately failed to materialize.¹¹⁷

As the new caption "Cooperation in Economic and Monetary Policy"¹¹⁸ suggests, the Single European Act does not greatly alter this state of affairs. The sole article added under this caption to the EEC Treaty calls upon the Member States to cooperate further in aligning their economic and monetary policies and to continue to "respect existing powers in this field."¹¹⁹ The only reference to an economic and monetary union in the Act is found in the preamble, in predictably vague and aspirational terms.¹²⁰ Accordingly, the Single Act's long-awaited reform of Community foundations actually leaves essentially intact the preexisting framework of intergovernmental cooperation with regard to economic and monetary policy.

The Member States' decision to introduce a chapter into the EEC Treaty specifically devoted to economic and monetary policy, while neither committing themselves to any new initiatives nor empowering the institutions to legislate a Community policy proper, reflects the profound differences of view among the states and the institutions regarding the Community's role in these sensitive domains.¹²¹ The clearest sign of this division appears in a provision of

BULL. EUR. COMM. (NO. 6) 8 (1978). The EMS, like its predecessor, is an essentially voluntary undertaking. Member States are free not to participate (and some have chosen not to), while non-Member States may be allowed to take part.

114. *EMS Res.*, *supra* note 113, at 10.

115. A European Monetary Cooperation Fund had previously been established within the Community legal framework. *Council Regulation 907/73*, 16 O.J. EUR. COMM. (NO. L 89) 2 (1973) [hereinafter *Reg 907/73*]. Later, it was authorized to use the new European Currency Unit. *Council Regulation 3180/78*, 21 O.J. EUR. COMM. (NO. L 379) 1 (1978).

116. *Building the Community*, 13 BULL. EUR. COMM. (NO. 12) 30 (1980).

117. See J. DE RUYT, *supra* note 42, at 180-81.

118. EEC Treaty, *supra* note 2, pt. 3, tit. II, ch. 1, *added by SEA*, *supra* note 1, art. 20.

119. *Id.* art. 102A(1).

120. SEA, *supra* note 1, preamble, para. 8 ("Whereas . . . the Heads of State or of Government approved the objective of the progressive realization of economic and monetary union.").

121. For example, the Commission and Belgium sought in the Single European Act to grant the Community legislative competence over monetary and economic policy, to incorporate the EMS and other achievements into the Community law system, and to commit the institutions to an economic and monetary union. Germany and the United Kingdom, for

the new chapter on economic and monetary policy which states that no institutional changes should occur in these fields without an amendment to the EEC Treaty formally authorizing them.¹²² Absent such an amendment, any significant development in this sphere will have to proceed, as in the past, along avenues of Member State cooperation, joint action among central banks, and the like. The scope of this provision is far from clear.¹²³ Ironically, its ultimate effect, if and when Treaty amendments are actually made to permit future institutional developments, may be to bring the whole sphere of economic and monetary policy squarely within the Treaty framework.¹²⁴

B. Regional Policy

The existence of gross disparities in economic development among the Community's various regions has long been a Community concern. The Single European Act, in keeping with its emphasis on creating a unified Community-wide market, makes elimination of these disparities an express Community function. Under the banner of "economic and social cohesion," the name given to the Community's new regional development policy,¹²⁵ the Single Act reaffirms the intent of "reducing disparities between the various regions and the backwardness of the least-favored regions."¹²⁶

different reasons, were strongly opposed. On these differences, see J. DE RUYT, *supra* note 42, at 178.

122. EEC Treaty, *supra* note 2, art. 102A, para. 2, *added by SEA, supra* note 1, art. 20. Britain in particular was fearful of being drawn into a monetary union or a Community-based system of central banks. See Lodge, *supra* note 20, at 208. Under a provision such as article 102A, it would not have been possible for the Council to have created the European Monetary Fund, as it did on the basis of article 235 of the EEC Treaty in its Regulation of April 3, 1973. Reg 907/73, *supra* note 115. For this reason, some commentators consider the Single Act's provisions on monetary cooperation "regressive in spirit if not in content." Murphy, *supra* note 3, at 262. See also Glaesner, *supra* note 63, at 454.

Article 102A also requires consultation of the Monetary Committee and the Committee of Governors of the Central Banks before any such institutional changes are made. EEC Treaty, *supra* note 2, art. 102A, *added by SEA, supra* note 1, art. 20. The Monetary Committee, established pursuant to article 105(2) of the EEC Treaty, is a standing advisory body whose function is to review the monetary and financial situation of the Community and the Member States, including their payments systems, and to advise the Council and Commission on those matters. Each Member State, as well as the Commission, appoints two members.

123. The Commission and the Council President filed a nineteenth declaration in the Final Act of the intergovernmental conference stating that the new Treaty provisions on monetary capacity are "without prejudice to the possibility of further development within the framework of the existing powers." *Final Act, supra* note 24, at 27 ("Declaration by the Presidency and the Commission on the monetary capacity of the Community").

124. See J. DE RUYT, *supra* note 42, at 187.

125. EEC Treaty, *supra* note 2, pt. 3, tit. V, *added by SEA, supra* note 1, art. 23 ("Policy of the Community").

126. *Id.* art. 130A. The preamble of the original Treaty itself expressed a desire to

In fact, significant regional development initiatives had preceded the Single European Act. For example, the European Social Fund and the European Agricultural Guidance and Guarantee Fund, both provided for in the original Treaty,¹²⁷ exerted an indirect impact on regional policy. By the 1970's, due to increasing regional economic disparities, the Member States had become convinced of the need for more direct action. Accordingly, in 1975 the Council used its implied powers under the EEC Treaty to establish the European Regional Development Fund (ERDF) designed to address the problem more directly.¹²⁸ Out of caution, the Council placed the Fund on provisional footing, financed it only modestly and, most importantly, refrained from providing for it directly in the Treaty.¹²⁹ However, subsequent improvements in financing and approach have helped turn the ERDF into a more effective force for regional development. As recently as 1984, the Council replaced the ERDF's governing statute with one that encourages comprehensive regional development planning (rather than project by project action) and allows the Commission to establish priorities in expenditures.¹³⁰ The creation of programs to aid current and prospective Mediterranean Member States had demonstrated the importance of a strong Commission hand in rationalizing the Community's regional policy as financed by the ERDF and the other structural funds.

The Single Act's provisions on economic and social cohesion merely ratify these developments. They call upon the Community to use the structural funds (including the ERDF, whose existence is now recognized in the Treaty¹³¹), as well as the European Investment

reduce regional economic differences and to promote the less-favored regions. EEC Treaty, *supra* note 2, preamble, para. 5.

127. EEC Treaty, *supra* note 2, arts. 40(4), 123-128.

128. Council Regulation 724/75, 18 O.J. EUR. COMM. (No. L 73) 1 (1975). The European Regional Development Fund was created with a stated intent "to correct the principal regional imbalances within the Community." *Id.* at 2. Its functions were primarily to provide grants for public and private investment in infrastructure and for industrial, service and craft activities. Fund monies, fixed as part of the regular budget negotiations, were allocated according to national quotas upon application by the states. The Fund is administered by the Commission, assisted by a Fund Committee and a Regional Policy Committee. See Murphy, *Towards a More Fairly Balanced and Better Quality of Life*, in COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTY YEARS OF COMMUNITY LAW 487, 492-93 (1983).

129. The Council instituted the Fund on the basis of a regulation adopted under the Community's implied powers. EEC Treaty, *supra* note 2, art. 235.

130. Council Regulation 1787/84, 27 O.J. EUR. COMM. (No. L 169) 1 (1984). For a positive account of the changes, see Croxford, Wise & Chalkley, *The Reform of the European Regional Development Fund: A Preliminary Assessment*, 26 J. COMMON MKT. STUD. 25 (1987).

131. EEC Treaty, *supra* note 2, art. 130C, *added by SEA*, *supra* note 1, art. 23. A new article 130E specifically directs that expenditures from the European Regional Development Fund be decided upon by the Council acting by qualified majority on a proposal from the

Bank, to promote economic and social cohesion. To this end, the Act directs the Council to make those institutional changes to the funds as may be needed to advance regional development in an effective and concerted way.¹³²

The new Treaty chapter on economic and social cohesion unquestionably demonstrates the Member States' desire to advance the funding of regional development and to give such funding a more solid legal basis. The formal recognition of regional development as a Community goal, and of the ERDF as an instrument to that end, represents sound policy, particularly in light of the Community's latest enlargements, its attachment to the internal market, and its concern for states whose economic interests may be injured through qualified majority decisionmaking. However, given its programmatic and institutional continuity with past practices, the Single Act's treatment of "economic and social cohesion" cannot plausibly be regarded as a major reform strategy.

C. *Worker Health and Safety*

Worker health and safety under the Single European Act has become a matter of Community competence, although as a subject it is much narrower than the social policy rubric under which the Act places it. A new article 118A of the EEC Treaty specifically contemplates the Council's adoption by qualified majority of directives that will harmonize and at the same time improve conditions in the working environment.¹³³ Accordingly, in regulating the workplace, the

Commission and according to a new parliamentary cooperation procedure, discussed *infra* Part V(B). The operations of the other structural funds remain unchanged. EEC Treaty, *supra* note 2, art. 130E, *added by SEA, supra* note 1, art. 23.

132. EEC Treaty, *supra* note 2, art. 130D, *added by SEA, supra* note 1, art. 23. On such matters, the Council acts unanimously upon a proposal of the Commission after consulting the European Parliament and the Economic and Social Committee. Within the one-year period provided by the Single Act, the Council had adopted the text contemplated by article 130D. *Council Regulation 2052/88*, 31 O.J. EUR. COMM. (No. L 185) 9 (1988). Regulations have since been adopted for implementing Regulation 2052/88 with respect to the different structural funds. *See, e.g., Council Regulation 4253/88*, 31 O.J. EUR. COMM. (No. L 374) 1 (1988) (coordination of activities of the different funds between themselves and with the European Investment Bank); *Council Regulation 4254/88*, 31 O.J. EUR. COMM. (No. L 374) 15 (1988) (European Regional Development Fund); *Council Regulation 4255/88*, 31 O.J. EUR. COMM. (No. L 374) 21 (1988) (European Social Fund); *Council Regulation 4256/88*, 31 O.J. EUR. COMM. (No. L 374) 25 (1988) (European Agricultural Guidance and Guarantee Fund).

133. EEC Treaty, *supra* note 2, art. 118A, *added by SEA, supra* note 1, art. 21. The adoption of such directives also entails consultation of the Economic and Social Committee and use of the new parliamentary cooperation procedure, discussed *infra* Part V(B).

On December 21, 1987, the Council, upon proposal by the Commission, adopted a resolution setting out a general framework for issuing workplace health and safety directives under article 118A. *Council Resolution of Dec. 21, 1987 (88/C 28/01)*, 31 O.J. EUR. COMM. (No. C 28) 1 (1988). For the underlying Commission document, see *Commission Communication*

Council is no longer confined to using Treaty article 100, which requires unanimity in the Council, or Treaty article 100A, which requires that legislation adopted under it bear a connection to the internal market. Moreover, worker health and safety is singled out as a field of social policy whose importance warrants actual Community legislation rather than the mere recommendation and coordination functions that the EEC Treaty generally assigns to the Commission in the social domain.¹³⁴

By treating occupational health and safety as a proper subject of harmonization, and by easing the process through qualified majority voting, the Act's drafters appealed to the Community institutions to address this policy area more effectively. However, the Single Act specifically requires that directives in this field be implemented gradually and with due regard for local conditions.¹³⁵ Moreover, in no event may worker health and safety legislation prejudice the development of small and medium-sized businesses.¹³⁶ The Act also expressly preserves the right of Member States to maintain or introduce more stringent occupational health and safety requirements if they wish.¹³⁷ Clearly, the Member States' enthusiasm for Community-wide regulation of workplace health and safety did not cause them to set aside entirely their fears that such regulation might prove either excessively or insufficiently protective.

D. Environmental Protection

The Single Act's introduction of a chapter on environmental protection seems entirely natural considering the dramatic increase in concern for the environment since the adoption of the EEC Treaty over thirty years ago. The Member States had long before recognized the importance of protecting the environment on a Community-wide

(88/C 28/02), 31 O.J. EUR. COMM. (No. C 28) 3 (1988). For an example of a directive adopted under article 118A, see *Council Directive 88/364*, 31 O.J. EUR. COMM. (No. L 179) 44 (1988) (banning certain activities and chemical agents in the workplace).

134. EEC Treaty, *supra* note 2, art. 118. However, the new article 118B maintains the Commission's traditional role as "facilitator." *Id.* art. 118B, *added by SEA, supra* note 1, art. 22. It calls upon the Commission to promote labor-management dialogue on a European scale and, conceivably, Community-wide bargaining agreements. In fact, article 118B only ratifies existing Commission practices.

135. *Id.* art. 118A(2), *added by SEA, supra* note 1, art. 21.

136. *Id.* art. 118(A)(2), para. 2. The Final Act's seventh declaration, made by the inter-governmental conference at West Germany's request, renounces any intent to discriminate unjustifiably against employees of small or medium-sized businesses in setting minimum health and safety requirements. *Final Act, supra* note 24, at 25 ("Declaration on Article 118A(2) of the EEC Treaty"). The proviso favoring small and medium-sized firms had been included originally to meet British concerns.

137. EEC Treaty, *supra* note 2, art. 118A(3), *added by SEA, supra* note 1, art. 21.

scale.¹³⁸ Since the early 1970's, the Council had used the EEC Treaty's implied powers and harmonization provisions to enact environmental legislation.¹³⁹ The Single Act essentially ratifies the Community's present involvement in environmental policy, while placing it on a firmer and more independent footing. The amended Treaty's statement of environmental policy objectives plainly demonstrates that the Community may act broadly in the interest of environmental protection without any demonstrated nexus to the establishment or functioning of the internal market.¹⁴⁰

These developments would ordinarily have foreshadowed more deliberate and intensive Community regulation of the environment in the future. However, the Member States were sufficiently troubled by the potentially far-reaching economic consequences of such regulation that they declined to make the same transition from unanimous to qualified majority voting in the Council that was made in other areas brought within the Community's sphere by the Single Act. Except where the Council expressly provides for decisions to be taken by a qualified majority vote,¹⁴¹ all environmental action by the Community requires the unanimous consent of the Council.¹⁴² Perhaps as a

138. Jacqué, *supra* note 77, at 604.

139. EEC Treaty, *supra* note 2, arts. 100, 235. Pursuant to a 1972 summit conference decision, *The First Summit Conference of the Enlarged Community*, 5 BULL. EUR. COMM. (No. 10) 20 (1972), committing the Community to the development of an environmental policy, the Community adopted three successive environmental action programs in 1973, 1977 and 1983. *Council Resolution of Nov. 22, 1973*, 16 O.J. EUR. COMM. (No. C 112) 1 (1973); *Council Resolution of May 17, 1977*, 20 O.J. EUR. COMM. (No. C 139) 1 (1977); *Council Resolution of Feb. 7, 1983*, 26 O.J. EUR. COMM. (No. C 46) 1 (1983). A new action program on the environment for the years 1987 to 1992 has been adopted by the Council under the Single Act. *Council Resolution of Oct. 19, 1987 (87/C 328/01)*, 30 O.J. EUR. COMM. (No. C 328) 1 (1987).

140. The Community may act "(i) to preserve, protect and improve the quality of the environment; (ii) to contribute towards protecting human health; (iii) to ensure a prudent and rational utilization of natural resources." EEC Treaty, *supra* note 2, art. 130R(1), *added by SEA*, *supra* note 1, art. 25. Article 130R(2) directs that, in advancing these goals, the Community should favor (1) the taking of preventive measures, (2) the correction of environmental damage at the source, and (3) the practice of requiring that polluters pay for environmental cleanup. *Id.* art. 130R(2). These principles are not new to the Community. Article 130R(3) further specifies factors the Community should consider before taking action relating to the environment. These factors include technological feasibility, regional differences in environmental conditions, cost-benefit calculations, and developmental needs of the Community and its regions. *Id.* art. 130R(3).

141. *Id.* art. 130S, para. 2.

142. *Id.* art. 130S, para. 1. Since unanimous voting remains the general rule for environmental protection measures, this is not a field in which the new parliamentary cooperation procedure of Community legislation, discussed *infra* Part V(B), has been made applicable. That procedure presupposes qualified majority voting. On the other hand, consultation of the European Parliament and the Economic and Social Committee will normally be required. EEC Treaty, *supra* note 2, art. 130S, para. 1, *added by SEA*, *supra* note 1, art. 25.

Insistence on a single-state veto did not come only from those Member States fearing

partial corrective to this procedural rule, the Single Act expressly instructs the institutions to take environmental protection values into consideration as a component of the Community's other policies.¹⁴³ Although this proviso may appear to be simply another indication of the environment's privileged position on the Community agenda, it actually should permit the institutions to use the more relaxed voting rules applicable to other Community policies, such as harmonization in aid of the internal market, whenever they seek to advance environmental protection as a component of that other policy rather than as an end in itself.

The Member States' ambivalence toward facilitating Community action on the environment is also reflected in the special preemption provisions included in the Treaty's environmental chapter. The Treaty empowers the institutions to adopt environmental legislation only where the Community's environmental policy objectives "can be attained better at [the] Community level than at the level of the individual Member States."¹⁴⁴ It also expressly preserves the right of individual states in this sphere, as in worker health and safety, to maintain or introduce national measures that are more protective than those established by the Community.¹⁴⁵

Unfortunately, the Single Act's acceptance of environmental protection as a component of other policies and its treatment of Community competence as subsidiary to national competence in the environmental policy field may prove problematic. In many cases, the

policies too protective of the environment or otherwise too costly. West Germany advocated a veto specifically in favor of those states whose environmental standards risked being lowered by Community action. See Jacqu , *supra* note 77, at 608. See also *supra* note 49 and accompanying text.

143. EEC Treaty, *supra* note 2, art. 130R(2), *added by* SEA, *supra* note 1, art. 25.

144. *Id.* art. 130R(4). This "subsidiarity" principle has been criticized as "clearly a step backwards," considering the wider possibilities offered for Community action on the environment prior to the Single European Act by articles 100 and 235. Vandermeersch, *The Single European Act and the Environmental Policy of the European Economic Community*, 12 EUR. L. REV. 407, 422 (1987). Article 130R(4) also requires that the Member States finance and implement the Community's environmental protection measures, except where to do so would prejudice "certain measures of a Community nature." EEC Treaty, *supra* note 2, art. 130R(4), *added by* SEA, *supra* note 1, art. 25. Article 130R(5) makes it clear that, within their respective spheres, both the Community and the Member States may cooperate with third countries and international organizations, and may negotiate and conclude international agreements. *Id.* art. 130R(5).

A ninth declaration adopted by the intergovernmental conference in the Final Act purports to bar the Community institutions in their environmental protection activities from interfering with Member State policies in the energy field. *Final Act*, *supra* note 24, at 25 ("Declaration on Article 130R of the EEC Treaty").

145. EEC Treaty, *supra* note 2, art. 130T, *added by* SEA, *supra* note 1, art. 25. However, there is some limit on Member State autonomy, since national measures must still be "compatible" with the EEC Treaty. *Id.*

Community institutions will properly seek to advance environmental concerns as a component of some other Community policy and thereby benefit from the availability of qualified majority voting in the Council. However, determining the maximum environmental component permitted in legislation ostensibly directed to meeting other goals may be difficult. Ultimately, the Court of Justice may have to ensure that the Council follows the voting procedure associated with the dominant policy objective pursued in the legislation.¹⁴⁶ The subsidiarity principle itself implies standards for determining when environmental protection measures are in fact better taken at one level than the other. However, the institutions will probably be guided more by the prevailing political circumstances than by any fixed set of legal rules, and the scope of judicial review will be correspondingly limited.¹⁴⁷

E. Research and Development

In keeping with a familiar pattern, the Single Act's formal introduction of research and development into the EEC Treaty framework represents an endorsement of the Community's previous involvement in the field and a promise of more sustained activity in the future.¹⁴⁸ Driven by the need for technological progress to boost Europe's competitiveness in the world economy, and cognizant of the advantages of technological cooperation on a Community-wide scale, the institutions throughout the 1970's and early 1980's devoted an increasing (though never a large) share of the Community budget to research

146. See Glaesner, *supra* note 16, at 294 (citing *Re the Draft International Agreement on Natural Rubber*, Opinion 1/78, 1979 E. Comm. Ct. J. Rep. 2871, [1979] 3 Comm. Mkt. L.R. 639, the opinion of the Court of Justice on the proper legal basis of the draft international agreement on natural rubber). More recently, the Court of Justice has had several opportunities to underscore the importance of using the correct legal basis for legislation, particularly when the applicable voting formula may be affected. See *infra* note 214 and accompanying text. See generally Note, *The EEC Legislative Process: An Evolving Balance?* 27 COLUM. J. TRANSNAT'L L. 679 (1989).

The choice between using article 100A and the environmental provisions of the Treaty does not only entail a difference in voting formula. Measures taken in the environmental area generally set minimum standards only. See *supra* note 145 and accompanying text. Thus, they are less useful in establishing an internal market than measures taken under article 100A, which normally presupposes uniformity. Ehlermann, *supra* note 27, at 383.

147. Krämer, *The Single European Act and Environment Protection: Reflections on Several New Provisions in Community Law*, 24 COMMON MKT. L. REV. 659, 665-69 (1987); Vandermeersch, *supra* note 144, at 422-23. This is particularly so since the Member States largely preserved unanimous Council voting on environmental matters and therefore enjoy political leverage at the legislative stage.

148. For an example of relatively early Community action in this field, see *Council Resolution of Jan. 14, 1974*, 17 O.J. EUR. COMM. (NO. C 7) 2 (1974) (regarding coordination of national policies and definition of actions of Community interest in the area of science and technology).

and development activities. The Single Act enhances this process by making it a Treaty goal to pursue Community research initiatives in a global framework designed to enhance their overall coherence, balance and responsiveness to various Member State priorities.¹⁴⁹

Thus, the Single Act does more than express Member State consensus on the need to promote Europe's technological development and enhance its international competitiveness.¹⁵⁰ It also carves out a distinct, if multifaceted, Community role in the matter. One fairly traditional aspect of this role consists of encouraging cooperation and joint efforts among governments, private enterprise, research centers and universities,¹⁵¹ and otherwise promoting research and development.¹⁵² However, the amended Treaty now also requires the Council to plan for research and development. Acting unanimously upon a proposal from the Commission, the Council must initially adopt a detailed multi-year "framework program" establishing the main outlines, objectives, priorities and budgetary aspects of the Community's research activities.¹⁵³ The Council then adopts, by qualified majority voting, a series of specific research programs to implement various facets of activity set out in the framework program.¹⁵⁴ The availability of qualified majority voting should not only accelerate Council decisionmaking, but also reduce the influence of narrow Member State preoccupations. To encourage further flexibility in project design and financing, the Single Act specifically authorizes the Com-

149. The Council had already taken some preliminary steps in this policy area. See *Council Resolution of July 25, 1983*, 26 O.J. EUR. COMM. (No. C 208) 1 (1983) (on the framework program for community research, development and demonstration activities). The framework approach inscribed in the Single Act is therefore not an innovation.

150. EEC Treaty, *supra* note 2, art. 130F(1), *added by SEA*, *supra* note 1, art. 24.

151. *Id.* arts. 130F(2) & H.

152. These other means include the Community's cooperation in the research activities of firms, research institutes, third countries and international organizations; dissemination of research results; and aid in the training and availability of research personnel. *Id.* art. 130G. Article 130G makes it clear that Community activity in this sphere should complement and not preempt Member State activity.

153. *Id.* arts. 130I, O, & Q. The framework program covering the years 1987 to 1991 has been adopted by the Council. *Council Decision 87/516*, 30 O.J. EUR. COMM. (No. L 302) 1 (1987), as supplemented by *Council Decision 88/193*, 31 O.J. EUR. COMM. (No. L 89) 35 (1988).

154. EEC Treaty, *supra* note 2, art. 130K, *added by SEA*, *supra* note 1, art. 24. The Single Act's new parliamentary cooperation procedure, discussed *infra* Part V(B), comes into play at this stage. EEC Treaty, *supra* note 2, art. 130Q(2), *added by SEA*, *supra* note 1, art. 24. Prior to the Single Act, the Council could only adopt legislation to further technology and development on the basis of article 235, which required unanimity.

For a listing of the many specific research programs adopted under article 130K, see 1 OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, DIRECTORY OF COMMUNITY LEGISLATION IN FORCE AND OTHER ACTS OF THE COMMUNITY INSTITUTIONS 673-76 (12th ed. 1988).

munity to launch supplementary research and development programs involving direct collaboration with some or all the Member States,¹⁵⁵ as well as with non-Member States and international organizations.¹⁵⁶ In fact, the Act indicates that the Community should have maximum latitude in devising appropriate structures for its research and development programs.¹⁵⁷

The considerable attention given to research and technological development in the Single European Act leaves the strong impression that changes in this field, more than in any other that has now formally been brought within the Treaty framework, lie at the heart of Community reform under the Act. As in those other fields, however, the relevant Treaty provisions bring regularity and refinement more than they bring radical change. Except for the introduction of qualified majority decisionmaking, the resemblance to past practices is striking. The detailed character of the Single Act's provisions on research and development largely mirrors a 1985 Commission memorandum on the topic.¹⁵⁸ It thus appears that even without the Single Act the Community would soon have established a more comprehensive technology and development policy.

IV. EUROPEAN POLITICAL COOPERATION

As the preceding discussion suggests, much of the Single European Act legitimizes prior initiatives and encourages their further development. There is no better example of this pattern than the Single Act's formal recognition of the existing program of European cooperation in foreign policy.¹⁵⁹ European political cooperation, as

155. EEC Treaty, *supra* note 2, arts. 130L & M, *added by* SEA, *supra* note 1, art. 24. The amended treaty provides that programs may entail the participation of certain Member States only, or may involve the Community as participant in the Member States' own research and development projects. The Single Act's reference to such possibilities, in effect, endorses the Community's participation in the Eureka programs. *See* 19 BULL. EUR. COMM. (No. 1) 20 (1986). Eureka is a program of government-funded research and development initiated by the French government in 1985 as a European response to the American strategic defense initiative. Though involving all the Member States (as well as certain non-Member States), Eureka was deliberately set up outside the Community framework to allow for greater flexibility and freedom of action. Acting through its own permanent secretariat in Brussels, Eureka supports civil projects ranging over a wide field.

156. EEC Treaty, *supra* note 2, art. 130N, para. 1, *added by* SEA, *supra* note 1, art. 24. The details of cooperation with third parties are to be determined through international agreements concluded under article 228 of the Treaty. *Id.* art. 130N, para. 2.

157. *Id.* art. 130O. However, a unanimous vote of the Council of Ministers in some instances may be required. *Id.* art. 130Q.

158. *Toward a European Technology Community*, COM(85)320 final. *See also* *Towards a Technology Community*, 18 BULL. EUR. COMM. (No. 6) 24 (1985); Lodge, *supra* note 20, at 216.

159. SEA, *supra* note 1, tit. III ("Provisions on European cooperation in the sphere of

the program is known, had grown for over fifteen years in an essentially informal and pragmatic fashion on the margins of the European Community system. Under the Single Act, Member State representatives continue to pursue a common European foreign policy. However, the various undertakings of the Member States in this department now have an identifiable legal basis and probably constitute matters of international obligation.¹⁶⁰ These undertakings are to consult on all foreign policy questions of general interest, to inform one another in advance of taking actions or positions on foreign policy matters, to seek and adhere to a Community-wide consensus, to take other Member State attitudes into account and otherwise avoid detracting from the force of Europe's voice in world affairs, and finally to entertain the possibility of joint action.¹⁶¹ The elevation in status of European political cooperation is accompanied by certain institutional changes, the most notable of which is the establishment of a permanent secretariat in Brussels to assist the President of the Council of Ministers, who traditionally presides *ex officio* over the political cooperation program.¹⁶²

Institutionalizing Member State engagements on a matter that touches the core of national sovereignty represents a substantial affirmation of European political unity.¹⁶³ As such, the Single Act provisions on political cooperation should help persuade other international actors that Europe intends to speak with one voice in world affairs. Nevertheless, the Act's actual impact on European political unity and on the efficacy of the political cooperation system remains debatable.

In the first place, although the framers of the Single Act placed coordination of Member State foreign policies on a firm international

foreign policy"). The decision to place political cooperation in a separate title of the Single European Act represents a compromise between those Member States that favored a separate political cooperation treaty and those preferring its integration into the basic Community treaties.

160. *Id.* art. 30(2)(a)-(d), (3)(c).

161. *Id.*

162. *Id.* art. 30(10)(g). The idea of establishing a permanent secretariat charged with the administrative aspects of political cooperation had long been a subject of consideration and debate. See J. DE RUYT, *supra* note 42, at 246. Situating the secretariat in Brussels, where the Commission has its secretariat, presents the advantage of greater coordination between the Community and political cooperation functions.

As before, the role of the President under the Single Act is to initiate, guide and manage the Member States' common efforts in the foreign policy sphere, as well as to represent those states in relevant discussions with third countries and international organizations. SEA, *supra* note 1, art. 30(10)(b).

163. SEA, *supra* note 1, art. 1 (identifying "concrete progress towards European unity" as a shared goal of the European Community and the European political cooperation systems alike).

law footing, they continued to entrust the enterprise to the Member States' representatives rather than to the institutions of the Community. Their description in intergovernmental terms of the European Council, traditionally the highest organ for the conduct of European political cooperation, underscores this point.¹⁶⁴ In fact, the Single Act clearly indicates that foreign policy cooperation is to take place under a regime that is fundamentally distinct from the Community's legal framework¹⁶⁵ and thus fails to build any additional "bridges" between the Community and political cooperation systems.¹⁶⁶ One commentator describes the Single Act's title on cooperation in foreign policy as "autonomous" in character.¹⁶⁷ While apt, this description

164. Article 2 of the Single Act describes the European Council as "bring[ing] together the Heads of State or of Government of the Member States and the President of the Commission." See *supra* note 7. It specifies further that the Council will be assisted by the ministers of foreign affairs and an additional member of the Commission. SEA, *supra* note 1, art. 2, para. 1. The Council is directed to meet at least twice a year. *Id.* art. 2, para. 2. Prior to the Single Act, the European Council conducted its activities in the political cooperation sphere solely on the basis of the communiqués growing out of the December 1974 summit conference. 7 BULL. EUR. COMM. (NO. 12) 7 (1974). Article 30(3)(a), treating political cooperation as such, calls on the ministers of foreign affairs and a member of the Commission to meet, as they now do, at least four times a year within the political cooperation framework. Their work continues to be prepared by the political directors meeting in the Political Committee and aided by the European Correspondents Group and various working groups. SEA, *supra* note 1, art. 30(10)(c), (e), (f).

165. Article 1 of the Single Act provides that political cooperation is governed by the provisions of Title III of the Act, in light of the procedures agreed to at various summit gatherings and in Member State practice. SEA, *supra* note 1, art. 1, para. 3. Article 3 adds that, while the Community institutions are to exercise their powers under the existing Treaties, as amended by Title II of the Single European Act, political cooperation proceeds in accordance with Title III and the supplementary procedures mentioned in article 1. *Id.* art. 3. See also, *id.* art. 32 (providing in effect that Title III of the Single Act—the part dealing with political cooperation—has no bearing on the Community treaties).

166. In practice, the European Council, see *supra* notes 7 & 164, serves as a common forum for discussion both of Community and foreign policy affairs. Political cooperation has also long been regarded as a proper subject for the Council of Ministers, meeting in a non-Community capacity, on the occasion of its regular sessions. Article 30(3)(a) of the Single Act only ratifies this practice. *Id.* art. 30(3)(a). The Act also confirms the tradition that the Council President serves concurrently as President of the political cooperation system. *Id.* art. 30(10)(a).

For its part, the Commission has long been involved in the political cooperation program at all levels. In "fully associat[ing]" the Commission in the political cooperation process through art. 30(3)(b), the Single Act entrenches this pattern, adding only that the Commission (speaking for the Community) shares with the President of the political cooperation system responsibility for ensuring consistency between the two systems. *Id.* art. 30(5).

As for the European Parliament, the Act confirms the institution's previously recognized right to be informed and to be heard on the foreign policy issues under examination within the political cooperation framework, and further provides that its views must be "duly taken into consideration." *Id.* art. 30(4). In this way, Parliament can be "closely associated" with the program. *Id.* Parliament's "close" association evidently represents a lower level of involvement than the Commission's "full" association, granted by art. 30(3)(b).

167. Glaesner, *supra* note 16, at 285. Article 32 of the Single Act affirms that Titles I

does not convey the essential fact that European political cooperation under the Act remains an intergovernmental process, without the powerful supranational elements that give Community law its special quality.¹⁶⁸

The Single Act not only codifies the separation of European political cooperation from Community activity proper, but also leaves essentially intact the preexisting practice of political cooperation, including the requirement of common consent for the adoption of a common foreign policy position.¹⁶⁹ Thus, despite their various commitments,¹⁷⁰ the Member States have preserved their ultimate freedom of action in the foreign policy sphere.¹⁷¹ The scope of political cooperation likewise remains unchanged, for the Single Act's announcement that it embraces the political and economic aspects of European security¹⁷² basically confirms prior Member State assumptions.¹⁷³ Especially in light of the ambitious plans for reshaping Euro-

and III do not affect the treaties establishing the European Communities. To remove any doubt about the matter, article 31 further provides that the jurisdiction of the Court of Justice does not extend to the Act's provisions on European political cooperation, European unity or the European Council. See Freestone & Davidson, *Community Competence and Part III of the Single European Act*, 23 COMMON MKT. L. REV. 793, 796 (1986).

168. Under the third and (at the time of the Single Act) latest Political Cooperation Report, 14 BULL. EUR. COMM. (NO. 3) 14 (1981) (London Report), cooperation in the sphere of foreign policy was still an intergovernmental rather than a Community law engagement. The Single Act does not alter this state of affairs. Under the Act, a Member State's infringement of its obligations in the political cooperation sphere presumably will still give rise only to the sanctions generally available under international law.

169. The Single Act is recognized as having codified the reports of Luxembourg (1970), Copenhagen (1973) and London (1981), all on the subject of political cooperation, as well as the Solemn Declaration of European Union (1983), see *supra* notes 3, 15, & 168, and certain practices established among Member States. See SEA, *supra* note 1, art. 1, para. 3. See also *supra* note 165. On the continuity of European political cooperation before and after the Single European Act, see Ifestos, *European Political Cooperation: Its Evolution from 1970 to 1986, and the Single European Act*, 11 J. EUR. INTEGRATION 47, 50 (1987); Nuttall, *European Political Co-operation and the Single European Act*, 5 Y.B. EUR. L. 203 (1985).

170. See *supra* notes 160-161 and accompanying text.

171. The Single Act speaks of a "European" rather than a "common" foreign policy, perhaps to avoid the integrationist connotations of the term "common" in the Community law context. SEA, *supra* note 1, art. 30(1).

On the other hand, the Community has an ongoing external relations competence whose scope parallels that of its internal competence. The Single Act does not address the question of where Community external relations (conducted by the Commission and Council) leave off and European political cooperation (conducted intergovernmentally) begins. Judgments on that matter inevitably will be made by the institutions and the Member States in the first instance, subject to possible review by the Court of Justice. The Single Act merely requires that the two sets of policies be "consistent." *Id.* art. 30(5).

172. *Id.* art. 30(6)(a).

173. The 1983 Stuttgart Declaration of European Union, *supra* note 15, positively included the economic and political aspects of security within the domain of political cooperation, a move already advocated in the 1981 London Report, *supra* note 168. Although the Declaration did not mention the military aspects of security or defense policy, issues such as

pean political cooperation that were circulating at the time the Single Act was drafted,¹⁷⁴ the Act cannot be regarded as either significantly enhancing the political cooperation system or as substantially building upon it for purposes of the Community's constitutional reform.

V. INSTITUTIONAL REFORM THROUGH THE SINGLE ACT

The idea of strengthening the existing political institutions has figured prominently in discussions of constitutional reform within the Community. The Tindemans Report, the Stuttgart Declaration and the Draft Treaty of European Union,¹⁷⁵ to name only a few of the proposals, all advocated transforming the Community into a more fully integrated political and economic European union. Among the elements of large-scale reform mentioned in these proposals were transforming the Commission into a parliamentary-style Government, elevating the European Parliament to the status of a full-fledged legislative body, and developing the Community into a true European federation.

Institutional reform under the Single European Act, though certainly not without interest or value, falls short of these expectations. The Single Act's failure to upgrade or integrate the system of European political cooperation has already been discussed.¹⁷⁶ As for reshaping the Community institutions proper, the results seem modest, even though the Court of Justice, the Commission, and the European Parliament are all the objects of reform.

The Act's changes to the structure and function of the Court, while substantial, do not seriously affect the Community's fundamental political arrangements. The Single Act authorizes the Council, at the Court's request, to vote unanimously to create an inferior Community tribunal.¹⁷⁷ By providing for a court of first instance¹⁷⁸ designed primarily to determine issues of fact, the Single Act's draft-

disarmament, East-West relations and European security had long been on the political cooperation agenda.

174. For example, the Draft Treaty of European Union would have authorized the European Council to extend political cooperation to such issues as arms, arms sales, defense policy and disarmament. *Draft Treaty*, *supra* note 5, art. 68(1). It also provided for the eventual transfer of the entire process from the domain of Member State cooperation to that of common action, though any such transfer was expressly declared to be freely reversible. *Id.* arts. 11(1), 68(3). Other ideas in circulation were to require that dissident states defer to dominant foreign policy views, to treat foreign affairs as a Community competence proper, and to allow the Commission a leading role in formulating European foreign policy.

175. See *supra* notes 3-16 and accompanying text.

176. See *supra* notes 164-174 and accompanying text.

177. ECSC Treaty, *supra* note 2, art. 32d, *added by* SEA, *supra* note 1, art. 4; EEC Treaty, *supra* note 2, art. 168A, *added by* SEA, *supra* note 1, art. 11; EAEC, *supra* note 2, art. 140A, *added by* SEA, *supra* note 1, art. 26. Prior consultation of the Commission and the

ers hoped to enhance judicial administration at the Community level. However, the decisions of the new court on issues of law remain subject to a right of appeal to the Court of Justice. Furthermore, actions brought by Member States or Community institutions, as well as those arising out of a request for a preliminary ruling, will bypass the new tribunal altogether. Judicial reform under the Single Act, though helpful in relieving congestion and delay in the Court¹⁷⁹ and therefore in promoting the rule of law in the Community, does not implement important constitutional change.

A. *The European Commission*

The treatment accorded the European Commission under the Single Act is more complex than that accorded the Court of Justice. The relationship between the Commission and the Council, designed in the Treaty of Rome to produce a proper balance of centripetal and centrifugal forces within the Community, had come to be viewed over time as increasingly problematic.¹⁸⁰ Although the Treaty vests the Commission with responsibility for drafting legislative proposals,¹⁸¹ the Commission ultimately must appeal politically to the Council in order to secure their adoption. Because of this dynamic, the Commission has tended to temper its normal integrationist impulses in proposing legislation to satisfy anticipated Member State objections.

European Parliament is required. Without these changes, it might have been necessary at a later date to amend the Community treaties in order to create new judicial institutions.

The court or courts to be created were expected to deal with staff matters, competition law, state aids, anti-dumping cases and other kinds of disputes that tend to be numerous and factually complex.

178. *Council Decision 88/591*, 31 O.J. EUR. COMM. (No. L 319) 1 (1988) (establishing a court of first instance of the European Communities). The decision confirms that the tribunal will hear staff cases, private claims against the institutions arising out of their actions in the competition law field, and actions against the Commission within the scope of the Coal and Steel Community Treaty. For the time being, the tribunal will not hear anti-dumping and subsidy cases, as the Court of Justice had also proposed. *Id.* art. 3.

The tribunal will consist of twelve members, who will select from among themselves a president to serve a three-year renewable term. *Id.* art. 2. It will normally sit in panels of three to five judges.

179. The Single Act's concern with judicial efficiency is also evident in its authorization of the Council to amend the Court's procedures as set out in Title III of the Statute of the Court of Justice. ECSC, *supra* note 2, art. 45, para. 2, *added by* SEA, *supra* note 1, art. 5; EEC Treaty, *supra* note 2, art. 188, para. 2, *added by* SEA, *supra* note 1, art. 12; EAEC, *supra* note 2, art. 160, para. 2, *added by* SEA, *supra* note 1, art. 27. The amendment procedure is the same as prescribed for establishing the new tribunal: a unanimous Council vote upon a proposal of the Court and the advice of the Commission and Parliament. Though strict, it is still simpler than the procedure necessary for direct amendment of the Statute of the Court, which takes the form of a treaty protocol. Normally, that procedure would entail Member State ratification of any amendments made.

180. See Lonbay, *supra* note 31, at 33.

181. EEC Treaty, *supra* note 2, arts. 149(1), 155.

Over the years, a number of factors have strengthened this tendency. These factors include the practice of voting by unanimous consent in the Council, even on matters properly subject to majority rule; the formation of an intergovernmental European Council capable of conducting Community affairs as well as European political cooperation; and the use of a committee system under which Member State representatives review the Commission's exercise of authority delegated to it by the Council. The net result of these and other trends has been to strengthen the Member States' influence over Community policy and to erode supranational decisionmaking in favor of intergovernmentalism and consensus politics.¹⁸² Accordingly, one component of virtually every proposal for revitalizing the Community has been an increase in the Commission's powers *vis à vis* those of the Council.

1. Delegation of Powers by the Council

The Single Act's only overt treatment of the Commission as Community executive concerns its exercise of executive functions delegated by Council legislation.¹⁸³ The record suggests that, except in certain areas (such as agricultural, commercial, and competition policy), the Council itself has determined how Community law should be implemented.¹⁸⁴ In an effort to promote delegation, and therefore greater efficiency in Community administration,¹⁸⁵ the Act adds a provision to the EEC Treaty expressly calling on the Council to confer executive authority on the Commission.¹⁸⁶ However, the original Treaty had already authorized the Commission to exercise the powers of implementation conferred by the Council,¹⁸⁷ and the Commission had been using them liberally for years with the apparent blessing of the Court.¹⁸⁸

The Single Act also does not disturb the notion that the Council itself may decide what powers to delegate and how to do so. On the one hand, the Act expressly allows the Council to reserve all executive powers to itself on any given matter, although it implies that this

182. See generally Lonbay, *supra* note 31, at 35.

183. This is to be contrasted with executive functions conferred directly by the Treaty.

184. See Glaesner, *supra* note 16, at 306.

185. There is general agreement that the Community could not have managed the number and frequency of measures in such important spheres as agricultural policy, the external tariff and the common commercial policy if the Council had not delegated wide implementation powers in these domains to the Commission.

186. EEC Treaty, *supra* note 2, art. 145, amended by SEA, *supra* note 1, art. 10.

187. EEC Treaty, *supra* note 2, art. 155.

188. *Einführ und Vorratsstelle für Getreide und Futtermittel v. Köster Berodt & Co.*, Case 25/70, 16 Recueil 1161, [1972] Comm. Mkt. L.R. 255 (1970).

should not be the general practice.¹⁸⁹ On the other hand, it endorses the Council's custom of placing conditions on the Commission's use of implementing powers, typically in the form of review by committees composed of Member State representatives.¹⁹⁰ With respect to the procedures governing such review, the amended Treaty now requires only that they "be consonant with principles and rules" that the Council, acting unanimously on a proposal from the Commission and the advice of Parliament, is to establish.¹⁹¹ The Council has since adopted a "comitology decision,"¹⁹² so called because it preserves the custom of committee review. The decision establishes a framework affording the Council a choice among three committee models for use in future legislation entailing the delegation of executive powers to the Commission. The models, all of which have precedent in Community practice, vary in the degree of leverage which they afford the committees and, indirectly, the Council. For example, an advisory committee will simply issue an opinion on implementation measures proposed by the Commission.¹⁹³ A management committee, acting by qualified majority, can require that such measures be remitted to the Council so that the latter, also by qualified majority and within a specified time limit, may endorse the measure or substitute its own.¹⁹⁴ A regulatory committee is one whose failure by qualified majority vote to affirmatively approve a Commission measure causes the measure to be referred to the Council for adoption by qualified majority.¹⁹⁵

189. "The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself." EEC Treaty, *supra* note 2, art. 145, amended by SEA, *supra* note 1, art. 10 (emphasis added). For the view that article 145, as amended by the Single Act, imposes an obligation on the Council to delegate executive power to the Commission, see Blumann, *Le pouvoir exécutif de la commission à la lumière de l'Acte unique européen*, 24 REV. TRIM. DR. EUR. 23, 30-32 (1988); Ehlermann, *Compétences d'exécution conférées à la commission: la nouvelle décision-cadre du Conseil*, 31 REV. M.C. 232, 233 (1988). For a more ambiguous reading of amended article 145, see Labouz, *supra* note 69, at 139-40.

According to the Commission, the Council thus far has failed in practice to make the broad and regular delegations of authority to the Commission that the Single Act requires. *Third Commission Report*, *supra* note 27, at 7, 12, 20; *Commission Midterm Report*, *supra* note 21, at 9. The Commission evidently regards this failure as among the more disappointing institutional features of the Single Act.

190. See *supra* note 182 and accompanying text.

191. EEC Treaty, *supra* note 2, art. 145, amended by SEA, *supra* note 1, art. 10.

192. *Council Decision 87/373*, 30 O.J. EUR. COMM. (No. L 197) 33 (1987) [hereinafter *Comitology Decision*]. The Decision also contains special rules governing the Council's delegation to the Commission of power to decide on safeguard measures. *Id.* art. 3.

193. The Commission is only required to "take the utmost account" of the advisory committee's opinion and to advise the committee as to how that was done. *Id.* art. 2.

194. Two versions of the management committee system are provided by the comitology decision. Variant (a) allows the Commission to defer for up to one month the application of the measure it has adopted. Variant (b) requires the Commission to do so for a period of time fixed in advance by the Council, but not to exceed three months. *Id.*

195. Presumably, if the Council decides to adopt an amended version of the measure, it

Although the overall effect of the comitology decision is to limit the variety and complexity of committee arrangements that may be devised to control the Commission's exercise of delegated powers, as well as to curtail discussion of these arrangements whenever legislation incorporating them is debated, the decision's exact impact will not be known until the Council establishes a pattern of choice among committee models. On its face, however, the decision seems to ratify the Council's pattern of pervasive reliance on management and regulatory committees, a reliance that previously rested on constitutional convention alone.¹⁹⁶

In sum, it is difficult to discern from a substantive point of view what the Single European Act adds to previous understandings about delegations to the Commission. Although it represents a further expression of support for delegation, an attitude that is understandable in light of the enormously complex and technical character of many of the measures still required for completion of the internal market, the Single Act essentially builds upon a familiar procedural landscape. Clearly the drafters were not prepared, as were proponents of the Draft Treaty of European Union¹⁹⁷ and other reform proposals,¹⁹⁸ to acknowledge the Commission's inherent executive

must vote unanimously to do so. EEC Treaty, *supra* note 2, art. 149(1), amended by SEA, *supra* note 1, art. 7. Two different options are provided for the case in which the Council fails to act within the time allotted. Under one variant, the Commission is free definitively to adopt its own proposal. Under a second variant—introduced into the comitology decision by the Council over the objections of the Commission—the Council, though unable to act by qualified majority, may still block the implementing measure by a simple majority vote to that effect. *Comitology Decision*, *supra* note 192, art. 2. This variant on the regulatory committee procedure goes beyond the other committee options and prior practices in the ease with which it allows the Council to defeat the Commission's exercise of delegated powers and in its tendency to favor nondecision. Parliament's legal challenge to the comitology decision, largely inspired by its opposition to this second variant of the regulatory committee, was recently rejected by the Court of Justice on the basis of Parliament's lack of standing under article 173 of the EEC Treaty to challenge Community acts in the Court. *Parliament v. Council*, Case 302/87, Sept. 27, 1988 (not yet reported). See *infra* note 227.

196. The Commission sought unsuccessfully at the intergovernmental conference to confine the Council to use of the advisory committee model. Glaesner, *supra* note 16, at 307. It was only able to obtain from the conference a first declaration in the Final Act urging that the Council, in the interest of an efficient decisionmaking process, give priority to the advisory committee procedure in delegating powers to the Commission for completion of the internal market. See *Final Act*, *supra* note 24, at 24 (Declaration on the powers of implementation of the Commission).

Thus far, the Council's practice, at least in internal market measures, has been to favor the management and regulatory committee model over the advisory committee model. The Commission has strongly and repeatedly condemned this pattern as counterproductive and contrary to the intent of the Single Act's framers. See *Commission Midterm Report*, *supra* note 21, at 9.

197. *Draft Treaty*, *supra* note 5, arts. 28(4), 40.

198. For example, the Dooge Committee Report had recommended that the Commis-

authority or otherwise attribute to it autonomous executive powers.

2. Qualified Majority Voting in the Institutional Equation

The Single Act's more significant strategy for strengthening the Commission entails change in the voting majority required for enactment of legislation by the Council, in particular a decided shift toward qualified majority rule. Although the drafters were moved in this direction partly by a simple desire to speed up the legislative process, they also realized that the Commission would enjoy greater political latitude to the extent that its proposals needed the support of only a qualified majority of votes in the Council of Ministers rather than a unanimous vote of the Council. The Single Act thus extends the regime of qualified majority voting to a wide variety of matters previously subject to a rule of unanimity.¹⁹⁹ Many of these matters—the alteration or suspension of duties,²⁰⁰ the right of establishment,²⁰¹ restrictions on the freedom to provide services,²⁰² the free movement of capital,²⁰³ sea and air transport,²⁰⁴ research and technological development,²⁰⁵ use of the European Regional Development Fund,²⁰⁶ worker safety and health,²⁰⁷ certain environmental decisions²⁰⁸ and

sion be accorded fully autonomous powers of initiation, implementation and management. See J. DE RUYT, *supra* note 42, at 140. The Commission itself had sought at the intergovernmental conference a general and direct grant of implementing powers with respect to the internal market program. See Ehlermann, *supra* note 27, at 403.

199. The original EEC Treaty provided for qualified majority voting only in such spheres as agriculture, competition law or commercial policy, where a Community policy was discernible or could readily be established. See J. DE RUYT, *supra* note 42, at 112-13. Initiatives on most other fronts required resort to articles 100 or 235, both of which called for the unanimous consent of the Council.

200. EEC Treaty, *supra* note 2, art. 28, *amended by* SEA, *supra* note 1, art. 16.

201. *Id.* art. 57(2). The change in voting relates to directives on the right of establishment in the fields of savings protection, lending, banking, and exercise of the medical, paramedical and pharmaceutical professions. Legislation in all of these areas previously required a unanimous vote in the Council. There remains a narrow exception for "amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons." The exception was made at the request of West Germany. See Ehlermann, *supra* note 27, at 377.

202. EEC Treaty, *supra* note 2, art. 59(2), *amended by* SEA, *supra* note 1, art. 16. The change to qualified majority voting specifically concerns the decision to extend the principle of free movement of services to nationals of third countries established within a Member State.

203. *Id.* art. 70(1). Article 70 governs only capital movements between Member and non-Member States. The Single Act specifically preserves unanimous voting for decisions that retreat from the liberalization of capital movements.

204. *Id.* art. 84(2). In certain circumstances, unanimity remains the rule.

205. *Id.* arts. 130K, L, M, N, P(1), Q(2), *added by* SEA, *supra* note 1, art. 24. However, the adoption of a framework program for research and technological development requires unanimity. *Id.* art. 130 Q(1).

206. *Id.* art. 130E, *added by* SEA, *supra* note 1, art. 23.

207. *Id.* art. 118A, *added by* SEA, *supra* note 1, art. 21.

208. *Id.* art. 130S, *added by* SEA, *supra* note 1, art. 25. However, environmental meas-

the Single Act's new general harmonization provisions²⁰⁹—relate directly or indirectly to completion of the internal market. Accordingly, their governance by qualified majority vote should be viewed in part as a means of more efficiently advancing that program. However, the drafters of the Single Act did not make qualified majority voting the general rule, even for measures in furtherance of the internal market.²¹⁰ For example, they could not secure agreement to introduce majority voting in the area of fiscal harmonization,²¹¹ or in the Community's exercise of implied powers under article 235 of the EEC Treaty. The Act concededly creates large possibilities for harmonization by qualified majority under articles 100A and 100B, as opposed to unanimous voting under article 100,²¹² but only, as previously discussed,²¹³ at the cost of making multiple escape devices available to dissident Member States. Given its limited sphere of application, the extension of qualified majority voting under the Single European Act may best be viewed as targeting matters on which the politics of unanimity is no longer deemed desirable. If this is so, it is more important now than ever for the Commission and Council to select the legally correct bases for their legislative initiatives.²¹⁴

ures may be adopted by qualified majority if a previous enactment, itself adopted by unanimity, so provides. *Id.* Otherwise, unanimity remains the rule.

209. *Id.* arts. 100A, 100B, added by SEA, *supra* note 1, arts. 18, 19.

210. The Commission originally proposed a general qualified majority rule for measures having to do with completion of the internal market, but the intergovernmental conference preferred to enumerate the Treaty articles in which the rule was to be introduced. See Ehlermann, *supra* note 27, at 376.

211. See *supra* note 78 and accompanying text. The drafters also declined the Commission's invitation to subject to qualified majority voting in the Council both the regulation of migrant workers' social security, EEC Treaty, *supra* note 2, art. 51, and the police power over aliens, *id.* art. 56(2).

212. Recall that articles 100A and 100B have no application to fiscal matters, the free movement of persons, or the rights and interests of employees. See *supra* notes 78-82 and accompanying text.

213. See *supra* text accompanying notes 54-71.

214. See *supra* note 146 and accompanying text. The Court of Justice has been asked on several occasions since adoption of the Single Act to examine the validity of the legal basis selected by the Council for its enactments. On the first such occasion, the Court upheld the Commission's right to bring such a challenge and found that the Council had improperly substituted unanimous voting under the article 235 implied powers provision for qualified majority voting under article 113 when it adopted certain tariff preferences for developing countries. *Commission v. Council*, Case 45/86, 1987 E. Comm. Ct. J. Rep. 1493, [1988] 2 Comm. Mkt. L.R. 131. For a full discussion of the case, see Note, *supra* note 146, at 713-18.

The Court has also entertained Member State claims that Council legislation adopted by qualified majority vote over that State's dissent ought to have been subject to unanimous voting. In both reported cases of this type, the Court found the Council's resort to qualified majority voting entirely proper. *United Kingdom v. Council*, Case 68/86, [1988] 2 Comm. Mkt. L.R. 543 (1988) (Council's adoption by qualified majority of a hormone ban pursuant to article 43 on agricultural policy is proper even though it also had consumer protection in view, and resort to unanimous voting under article 100 is therefore unnecessary); *United Kingdom*

Ultimately, extending qualified majority voting to a wider range of issues will not succeed as a reform strategy unless the Council actually votes on those issues. Although the negotiators of the Single Act were unwilling to address the future of the Member State veto associated with the Luxembourg Accords,²¹⁵ they did recognize the general importance of conducting votes on qualified majority matters. During the 1986 ratification period, under pressure from the Commission and especially from Parliament, the Council agreed to modify its internal rules of procedure to compel the Council President to call a vote whenever a request to that effect is made by a Member State or the Commission and is supported by a majority of Member States.²¹⁶ In practice, this amendment goes a long way to securing the political advantages of qualified majority voting.

Notwithstanding the greater scope and effectiveness of qualified majority voting under the Single European Act, the fact remains that some important measures continue to require unanimous consent in the Council.²¹⁷ Moreover, the passage of legislation by qualified majority vote under the Single Act presupposes, as before, that the Council act in accordance with the Commission proposal currently before it, since any departure from that proposal requires a unanimous Council vote.²¹⁸ Coupled with the Single Act's general continuity with past practices on delegation to the Commission, the cautious

v. Council, Case 131/86, [1988] 2 Comm. Mkt. L.R. 364 (1988) (rules for protection of laying hens may be adopted by majority vote as an agricultural measure under article 43 without need for additional reliance on article 100).

All of the cited cases involved the choice between a specific legal basis and a general one, such as article 100 or 235, and therefore were influenced by a preference for the *lex specialis*. See generally Bradley, *The European Court and the Legal Basis of Community Legislation*, 13 EUR. L. REV. 379, 388-94 (1988).

215. See *infra* Part V(C).

216. Rules of Procedure of the Council of Ministers, art. 5(1), as amended by Council Amendment 87/508, 30 O.J. EUR. COMM. (No. L 291) 27 (1987). See generally J. DE RUYT, *supra* note 42, at 118-19. The President of the Council filed a twelfth declaration in the Final Act of the intergovernmental conference committing the Council to early improvements in its decisionmaking procedures. See *Final Act*, *supra* note 24, at 26 ("Declaration by the Presidency on the time limit within which the Council will give its opinion following a first reading (Article 149(2) of the EEC Treaty)").

217. For example, the EEC Treaty still subjects to unanimous vote the following: adoption of the Community's general program for research, EEC Treaty, *supra* note 2, art. 130Q(1), added by SEA, *supra* note 1, art. 24; the general regulation governing structural funds, *id.* art. 130D, added by SEA, *supra* note 1, art. 23; the regime of management and regulatory committees, *id.* art. 145, amended by SEA, *supra* note 1, art. 10; fiscal harmonization, *id.* art. 99, amended by SEA, *supra* note 1, art. 17; and conceivably all environmental protection measures, *id.* art. 130S, added by SEA, *supra* note 1, art. 25.

218. *Id.* art. 149(1), amended by SEA, *supra* note 1, art. 7. The Commission, also as before, generally may amend its proposal at any time to conform with current Council sentiments and thereby permit its enactment by a qualified majority. *Id.* art. 149(3).

extension of qualified majority voting underscores the Member States' unreadiness for some of the more dramatic strategies that were available for strengthening the Commission *vis à vis* the Council. Their unwillingness to vest the Commission with autonomous executive power has already been mentioned.²¹⁹ Further, they did not embrace, nor even seriously consider, the idea of drawing the Commissioners from the European Parliament in the fashion of a parliamentary-style Government.²²⁰ Such a change would have given the Commission a political power base and thereby greatly enhanced its stature and influence.

B. *The European Parliament: A Legislative Role*

Like the Commission, the European Parliament seemed poised for institutional gains under the reforms discussed in the years preceding the Single Act. In some ways, the "democratic deficit" that Parliament's direct election²²¹ sought to cure was only heightened by the institution's virtual powerlessness in the legislative process. Aside from budgetary matters,²²² Parliament played a merely consultative role, and then only on a limited number of subjects as a matter of right.²²³ The prospective elevation of Parliament under the Draft Treaty of European Union nearly to the status of a co-legislator with the Council²²⁴ illustrates the institutional ground it stood to gain. The same may be said of other proposals for strengthening the Commission's accountability to Parliament, such as giving Parliament the right to confirm the nomination of Commission President, to vote on

219. See *supra* text accompanying notes 189-196.

220. Thus there is no reason ever to suppose that the composition of the Commission reflects political sentiment in the European Parliament. See generally J. DE RUYT, *supra* note 42, at 119-20.

221. Members of the European Parliament have been elected directly by citizens of the Member States since 1979. Prior to that, representatives were chosen from among members of each state's national parliament.

222. In budgetary matters, Parliament has a real power of co-decision. *Treaty Amending Certain Budgetary Provisions*, 14 J.O. COMM. EUR. (No. L 2) 1 (1971); *Treaty Amending Certain Financial Provisions*, 20 O.J. EUR. COMM. (No L 359) 1 (1977).

223. Probably the most positive development for Parliament's role in the legislative process prior to the Single Act was the 1975 Joint Declaration of the institutions setting up a conciliation procedure for all legislation having "appreciable financial implications" and not required by existing Community law. *Joint Declaration of the European Parliament, the Council and the Commission*, 18 O.J. EUR. COMM. (No. C 89) 1 (1975). On a matter subject to the procedure, whenever the Council intends to depart from a parliamentary opinion, it must first participate in conciliation with Parliament in an effort to reach agreement.

224. *Draft Treaty*, *supra* note 5, arts. 36, 38. Parliamentary co-decision was also endorsed in the Tindemans Report, *supra* note 3, and in the earlier Vedel Committee Report, *Report by the Ad Hoc Group examining the question of increasing Parliament's Powers*, 5 BULL. EUR. COMM. (Supp. 4) (1972) [hereinafter *Vedel Committee Report*].

the Commission's investiture and, at the extreme, to supply the Commission's membership.²²⁵ The idea of parliamentary co-decision encountered difficulties because it necessarily lessened the Council's political power and thereby fundamentally altered the balance between supranationalism and national sovereignty within the Community legal order. On the other hand, suggestions for increasing the Commission's accountability to Parliament failed on account of their tendency to move the Community too rapidly toward a parliamentary model of government.²²⁶ Still, given the wide range of available options, the Single Act's treatment of Parliament comes as a disappointment to advocates of a substantially enhanced role for that institution.²²⁷

1. The New Parliamentary Cooperation

The Single European Act changes Parliament's legislative functions in three ways. First, it increases the number of subjects as to which Parliament is consulted as of right on Commission proposals.²²⁸ Second, it breaks newer ground by actually requiring parliamentary assent with respect to two matters: the accession of new Member States²²⁹ and the Community's entry into association agree-

225. See, e.g., *Vedel Committee Report*, *supra* note 224.

226. J. DE RUYT, *supra* note 42, at 119-20. Under both the original and amended Treaty, Parliament has only the right to censure the Commission and thereby force its collective resignation. EEC Treaty, *supra* note 2, art. 144.

227. The Single European Act also refrains from giving Parliament a treaty-based right under article 173 to challenge acts of the Council or Commission in the Court of Justice, even though the Commission supported that idea in the intergovernmental conference. Parliamentary standing was an open question until recently. In 1985, the Court of Justice admitted that Parliament could proceed against the Council under article 175 for its failure to act. *Parliament v. Council*, Case 13/83, 1985 E. Comm. Ct. J. Rep. 1513, [1986] 1 Comm. Mkt. L.R. 138. The following year, it held that parliamentary action could be a proper object of annulment proceedings under article 173. *Parti écologiste "Les Verts" v. Parliament*, Case 294/83, 1986 E. Comm. Ct. J. Rep. 1339, [1987] 2 Comm. Mkt. L.R. 343; *Council v. Parliament*, Case 34/86, 1986 E. Comm. Ct. J. Rep. 2155, [1986] 3 Comm. Mkt. L.R. 94. However, the Court confirmed in 1988 that Parliament as a general matter lacks standing to seek annulment of Council or Commission acts under article 173. *Parliament v. Council*, Case 302/87, Sept. 27, 1988 (not yet reported). See *infra* note 255.

By contrast, the Draft Treaty, *supra* note 5, art. 43, extended to all Community institutions the same status before the Court of Justice.

228. The Single Act itself expressly brings many of these subjects within the Community sphere. See SEA, *supra* note 1, arts. 4, 11, & 26 (decisions concerning the Court of Justice); art. 10 (Commission implementation practices); art. 17 (fiscal harmonization); art. 23 (reorganization of structural funds); art. 24 (certain decisions on research and technological development); art. 25 (on environmental protection). On the other hand, action in many of these areas previously had been taken under the implied powers provision, EEC Treaty, *supra* note 2, art. 235, which also required the advice of Parliament.

229. EEC Treaty, *supra* note 2, art. 237, amended by SEA, *supra* note 1, art. 8.

ments with third countries.²³⁰ Thus, the Single Act strictly limits the scope of parliamentary co-decision. Combined with the Act's denial to Parliament of any formal role in the Commission's use of executive authority delegated to it by the Council,²³¹ these institutional changes must be construed as modest.

Parliament's only real gains under the Act came from a third innovation, namely the introduction in a limited sphere of a modified legislative process called the "cooperation procedure."²³² This new procedure's essential feature, apart from its constitutional originality, is precisely the enhanced participation it accords Parliament in the legislative process. Essentially, the cooperation procedure replaces the usual legislative process in certain designated fields.²³³ The procedure requires that the Council solicit Parliament's opinion on any legislative proposals emanating from the Commission.²³⁴ Upon

230. *Id.* art. 238, amended by SEA, *supra* note 1, art. 9. Parliament previously had no formal role whatsoever in accession or association agreements.

The Commission and certain Member States had suggested that parliamentary assent be required in still other Council decisions—for example, Treaty amendments, internal market measures and measures in the newer sectors—but the negotiators of the Single Act did not agree. See J. DE RUYT, *supra* note 42, at 122. The Act also refrains from giving Parliament a power of co-decision, or even a consultative role, over the Community's trade agreements under articles 113 and 114 of the EEC Treaty.

231. This was a legislative role that Parliament had earnestly sought in the negotiations leading to the Single Act. See Bieber, Pantalis & Schoo, *Implications of the Single Act for the European Parliament*, 23 COMMON MKT. L. REV. 767, 789-90 (1986).

232. EEC Treaty, *supra* note 2, art. 149, amended by SEA, *supra* note 1, art. 7. See generally Bieber, Pantalis & Schoo, *supra* note 231.

233. Among these fields, all of which call for adoption by qualified majority only, some were contemplated in the original EEC Treaty and others were added by the Single Act itself. Measures in the former category relate to discrimination based on nationality or impairment of the principle of free movement of persons. See EEC Treaty, *supra* note 2, art. 7, amended by SEA, *supra* note 1, art. 6 (elimination of nationality based discrimination); *id.* art. 49 (free movement of workers); *id.* arts. 54(2), 56(2) sent. 2 (freedom of establishment); *id.* art. 57, except para. 2 sent. 2 (mutual recognition of diplomas). With respect to one of these fields, measures taken under article 49 originally required only a simple majority vote in the Council, so that bringing them within the sphere of parliamentary cooperation has had the effect of making their enactment more rather than less difficult.

On the other hand, those competences added by the Single Act offer the cooperation procedure a broader sphere of operation. This refers more to the wide-ranging opportunities for harmonization in aid of the internal market offered by articles 100A and 100B, discussed earlier at *supra* Parts II(A) & (C), both of which expressly entail parliamentary cooperation, rather than to the harmonization in the specified fields of worker health and safety regulations, EEC Treaty, *supra* note 2, art. 118A, added by SEA, *supra* note 1, art. 21; decisions on spending from the Regional Development Fund, *id.* art. 130E, added by SEA, *supra* note 1, art. 23; or various aspects of research and technological development, *id.* art. 130Q(2), added by SEA, *supra* note 1, art. 24. Even so, the field of application of the cooperation procedure is strictly enumerated.

234. Not only is Parliament free to express an opinion on a proposal, but it may seek to persuade the Commission to withdraw or amend the proposal before the Council has had an opportunity to act upon it. Because the proposal that the Commission eventually submits to

receiving Parliament's opinion, the Council, by qualified majority vote (or, if it seeks to amend the Commission proposal, by unanimous vote), may approve a provisional outcome, or "common position."²³⁵ Thus far, the cooperation procedure resembles the usual course of qualified majority legislation. The difference is that instead of adopting a definitive text, the Council launches a "second reading." This entails transmitting the common position to Parliament for fresh consideration, along with an explanation of views by both the Council and the Commission. Should Parliament within the next three months either approve the common position by a majority of votes cast or remain silent, the Council must adopt the common position without further change.²³⁶ However, the situation is different if within the same three months, Parliament votes by an absolute majority of its membership either to amend the common position or to reject it outright.²³⁷ If Parliament rejects the common position, then the Council still may adopt the measure within three months, though only if it votes unanimously to do so. This result may not be feasible, particularly if the Council had originally approved the common position only by a qualified majority vote.²³⁸

If Parliament proposes amendments to the common position, the matter returns to the Commission for a reexamination of its original proposal in light of the suggestions made by Parliament.²³⁹ By directing parliamentary amendments to the Commission for review, rather than to the Council for an immediate vote, the cooperation procedure preserves the Commission's traditional monopoly in proposing legislation to the Council. Within one month, the Commission forwards its reexamined proposal to the Council for a second reading,

the Council forms the basis for a provisional decision, and because that decision in turn becomes the point of reference for all subsequent debate and modifications, it is essential that Parliament seek to exert its influence over the Commission at an early stage. For a discussion of ways to open an early dialogue between Parliament and the Commission, see Fitzmaurice, *An Analysis of the European Community's Co-operation Procedure*, 26 J. COMM. MKT. STUD. 389 (1988). See also Note, *supra* note 146, at 708-09.

235. EEC Treaty, *supra* note 2, art. 149(2)(a), added by SEA, *supra* note 1, art. 7.

236. *Id.* art. 149(2)(b).

237. Significantly, amendment or rejection by Parliament of the common position requires a vote to that effect by an absolute majority of the body's membership, whether present and voting or not. The fact that the majority needed to deviate from the Council's common position is more difficult to attain than the simple majority of votes cast required to approve it may create an incentive for Parliament to favor the position. See Note, *supra* note 146, at 700.

238. If the Council cannot muster the unanimity required to override the rejection, no action may be taken on the measure. The Council also may not at this stage amend the common position in order to secure unanimous support. Parliament's disapproval of the common position therefore may become a cause of inaction on the Community's part.

239. EEC Treaty, *supra* note 2, art. 149(2)(c), added by SEA, *supra* note 1, art. 7.

indicating specifically the parliamentary amendments it has chosen not to incorporate.²⁴⁰ Unfortunately, the wording of the Single Act is ambiguous as to whether the Commission may amend the proposal in ways other than Parliament has suggested. While the text does not clearly confine the Commission to choosing among the amendments advanced by Parliament on its second reading,²⁴¹ such a construction would ensure that the final proposal and vote involve a text that Parliament voted on and helped to shape.²⁴² Ultimately, the Court of Justice will be called upon to resolve this question and thereby help determine the extent to which the Single Act's cooperation procedure has strengthened the parliamentary presence in the legislative process.

After receiving the Commission's reexamined proposal, the Council may vote either by qualified majority to adopt the proposal or by unanimity to adopt it together with any parliamentary amendments not accepted by the Commission, or with amendments of the Council's own choosing.²⁴³ The Single Act is equally ambiguous as to the Council's freedom of action during its second reading. The text does not clearly confine the Council to adding parliamentary amendments to, or deleting them from, the Commission's new proposal.²⁴⁴ Different views have been advanced on the wisdom of confining the Council's amendment power. On the one hand, allowing the Council substantial freedom to adopt unanimously a text that deviates from the Commission's pending proposal would maintain a traditional principle of Community lawmaking.²⁴⁵ On the other hand, limiting the Council on second reading to considering only the amendments

240. *Id.* art. 149(2)(d).

241. Article 149(2)(d) of the amended treaty merely describes the Commission's reexamination as "taking into account" the parliamentary amendments and requires that the Commission indicate those among them that it has not embraced. This clearly suggests that the parliamentary amendments will be the focus of the reexamination, but does not necessarily prevent the Commission from considering other changes.

242. For forceful policy arguments that the Commission should have to select from among the parliamentary amendments, see Glaesner, *supra* note 63, at 466-67; Jacqu , *supra* note 77, at 592-93; Note, *supra* note 146, at 704-05. See also Bieber, Pantalis & Schoo, *supra* note 231, at 784. For the view that the Commission may exercise a wider scope of amendment, see J. DE RUYT, *supra* note 42, at 132 (relying in part on article 149(3) of the amended treaty, which broadly reaffirms the Commission's freedom to alter its proposal at any time as long as the Council has not acted). See also Lonbay, *supra* note 31, at 60; Usher, *The Single European Act*, 19 BRACON L.J. 64, 67 (1987).

243. EEC Treaty, *supra* note 2, art. 149(2)(d) & (e), added by SEA, *supra* note 1, art. 7.

244. Article 149(2)(d) expressly allows the Council to adopt by unanimity those parliamentary amendments that the Commission did not accept, thereby suggesting that its focus on second reading be on those amendments. However, paragraph (e), which also requires unanimity in order for the Council to amend the reexamined proposal, suggests that the Council may consider other amendments as well.

245. See generally T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 33 (2d ed. 1988). See also Lonbay, *supra* note 31, at 60.

proposed by Parliament again would ensure a significant place for Parliament's views in the remaining legislative debate.²⁴⁶ The Court of Justice eventually will be called upon to settle this question as well, and again help determine the real strength of Parliament's voice in the parliamentary cooperation procedure. Finally, if the Council does not act within three months after receiving the Commission's reexamined proposal, the whole proposal lapses.²⁴⁷ This feature of the cooperation procedure, as much as any other, has fed fears that the process may result in delay and inaction.²⁴⁸

Although the cooperation procedure unquestionably enhances Parliament's voice in the legislative process, it is limited in scope and function. As previously discussed,²⁴⁹ the procedure applies only to the adoption of measures specifically designated in the Single European Act. In regard to other matters subject to qualified majority voting or matters that, whatever the voting requirement, seem central to achieving the internal market,²⁵⁰ Parliament has at most a

246. See generally Glaesner, *supra* note 63, at 467; Note, *supra* note 146, at 706-07.

247. EEC Treaty, *supra* note 2, art. 149(2)(f), added by SEA, *supra* note 1, art. 7. The three-month period allotted for both Parliament's and the Council's second reading may be extended by one month if both institutions agree. *Id.* art. 149(2)(g). If the proposal lapses, there will have to be a new Commission proposal, followed by two successive readings in Parliament and Council, to adopt the legislation.

The passage of three months without Council action is not unlikely. When Parliament forwards amendments to the common position, and the Commission is called upon to reformulate its proposal, the political pressures affecting the Council may be such that it is unable to take definitive action within the allotted time.

The rule of tacit nonadoption of the reexamined Commission proposal stated in the text deliberately favors the Council's position. The Council's inaction results in adoption neither of the Commission proposal nor of the parliamentary version, if different. By contrast, the Draft Treaty of European Union provided that in the event either the Council or Parliament failed to submit draft legislation to a vote, the measure would be deemed adopted, provided the other body had voted for it. Of course, the Draft Treaty had broadly accepted the idea of parliamentary co-decision. See *supra* note 12 and accompanying text. The Single Act plainly reflects the Member States' unwillingness even at this particular stage of the cooperation procedure to give Parliament the "last legislative word." See generally J. DE RUYT, *supra* note 42, at 136-37.

248. See generally Lodge, *supra* note 20, at 215. A certain amount of delay inheres in any legislative process that calls for two readings by each participating institution, especially when, as in the cooperation procedure, the first reading does not entail time limitations. The Council, in particular, is under no time constraint in arriving at a common position after receiving Parliament's opinion upon first reading. By contrast, Parliament must respond to the common position within three months.

The Commission, reporting in March 1988 on the progress of the internal market program, found a substantial backlog in proposals pending before the Council, and attributed this partly to delays associated with the parliamentary cooperation procedure. *Third Commission Report*, *supra* note 27, at 11. However, by the time of its midterm progress report in November of that year, the Commission found that the pace of decisionmaking under the procedure had quickened. *Commission Midterm Report*, *supra* note 21, at 9.

249. See *supra* text accompanying note 233.

250. For matters that are subject to qualified majority voting, though not subject to the parliamentary cooperation procedure, see EEC Treaty, *supra* note 2, art. 55 (measures con-

consultative function in the legislative process.²⁵¹ The reasons for introducing parliamentary cooperation into some, rather than all, areas of Community legislation, or for selecting certain areas rather than others, have never been adequately explained.²⁵² Critics have aptly remarked how the difference in parliamentary function under the ordinary and the cooperation procedures may cause institutional conflict over the proper legal basis of proposed legislation, with Parliament arguing wherever possible for a basis that entails parliamentary cooperation and the Council preferring one that avoids it.²⁵³ Such disputes, much like those caused by the Council's preference for legal bases requiring unanimous rather than qualified majority voting,²⁵⁴ will inevitably reach the Court of Justice.²⁵⁵

2. The Dynamics of Parliamentary Cooperation

The cooperation procedure fails to dramatically improve the Community legislative process, not only because of its limited sphere of application, but also because of the functionally limited role it assigns to Parliament. As previously discussed,²⁵⁶ the cooperation procedure does not confer on Parliament a real power of co-decision. Of course, that fact alone does not deprive the procedure of significance for Parliament. Cooperation allows Parliament to undertake a second reading of proposed legislation, which provides Parliament

cerning the public service exception to the freedom of establishment); arts. 59 (as amended) & 63 (free movement of services); arts. 69 & 70(1) (as amended) (free movement of capital); art. 28 (as amended) (modification or suspension of tariffs); art. 43 (agricultural policy); arts. 75(1) & 84 (as amended) (transport policy). Those articles listed as amended were amended by the Single European Act, *supra* note 1, art. 16.

251. For example, in the area of the free movement of capital, Parliament still does not have a right to be consulted on pending legislation. EEC Treaty, *supra* note 2, arts. 67-73.

252. See generally J. DE RUYT, *supra* note 42, at 127. One anomaly is that the free movement of services is not subject to the new cooperation procedure even though it is closely linked to the free movement of workers and freedom of establishment, both of which are subject to the new procedure. Until now, they all had been governed by similar voting principles. See Murphy, *supra* note 3, at 243-44.

253. Fitzmaurice, *supra* note 234, at 394; Lodge, *The Single European Act and the New Legislative Cooperation Procedure: A Critical Analysis*, 11 J. EUR. INTEGRATION 5, 14-15 (1987).

254. See *supra* note 214 and accompanying text.

255. When the Commission proposed and the Council adopted the so-called "post-Chernobyl" regulation on radiation levels, *Council Regulation 3954/87*, 30 O.J. EUR. COMM. (No. L 371) 11 (1987), on the basis of article 31 of the Euratom Treaty rather than article 100A of the EEC Treaty, Parliament strenuously objected on the ground that those institutions had thereby avoided the parliamentary cooperation procedure. See Fitzmaurice, *supra* note 234, at 394. Parliament's challenge in the Court of Justice, *European Parliament v. Council*, Case 70/88 (still pending), faces a substantial standing problem. See *supra* note 227. For a fuller discussion, see Note, *supra* note 146, at 697 n.112.

256. See *supra* note 208 and accompanying text.

with the opportunity to influence a legislative proposal that has ripened into a provisional Council position. By proposing amendments to the common position, Parliament can require a second reading by the Commission and, regardless of outcome, by the Council, which naturally increases the opportunities to exert legislative influence. If Parliament finds the Council's common position altogether unacceptable, it can require the Council to act by unanimity.²⁵⁷ Unless exercised in an abusive manner, these various prerogatives and, perhaps more importantly, the mere prospect of their exercise may cause the Commission and the Council to embrace certain parliamentary views they otherwise would not favor. Parliament's hand will thus be strengthened.

Nevertheless, the cooperation procedure still only allows Parliament to persuade rather than to decide. In order to defeat legislation, Parliament must reject the legislation and then dissuade one or more states from supporting it in the Council of Ministers. Where Parliament instead votes to amend the Council's common position, it will endeavor to persuade the Commission of its views, in which case only a qualified majority of the Council will be needed to adopt them. If Parliament is unable to convince the Commission, it still may use its influence in the Council to prevent adoption of the reexamined proposal by qualified majority.

At all stages, Parliament has a strong interest in winning Commission support for its views; for unless it does so, it will later face the even more difficult task of rallying the Council's unanimous consent.²⁵⁸ Moreover, in the competition for Council favor, the Commission enjoys the advantage that only its proposal may be enacted by qualified majority in the Council. Throughout the cooperation procedure, Parliament can neither force its views on an unwilling Commis-

257. Parliamentary influence must be timely, however. A failure to respond to the common position within three months entitles the Council to enact it into law as it stands. EEC Treaty, *supra* note 2, art. 149(2)(b), *added by SEA, supra* note 1, art. 7. By contrast, the Council's failure to take action within three months from receipt of the Commission's reexamined proposal simply brings the legislative process to an end. *Id.* art. 149(2)(f). See *supra* note 247 and accompanying text.

258. The Commission's failure to incorporate Parliament's proposed amendments in its reexamined proposal conceivably could lead to a parliamentary motion of censure under article 144 of the Treaty. If successful, this motion would cause the Commission's removal from office. Though the censure motion has never been used, the prospect of its use may serve to strengthen Parliament's hand in its dealings with the Commission under the cooperation procedure. On the possibility of censure in this situation, see Jacqué, *supra* note 77, at 593; Labouz, *supra* note 69, at 154; and Note, *supra* note 146, at 682, 703.

On at least one occasion, the Commission has cited the Council's "occasional tendency" in its practice of the cooperation procedure to reject systematically Parliament's proposed amendments. *Third Commission Report, supra* note 27, at 13.

sion nor prevent the Council from adopting legislation over its objections. There also remains the possibility that these institutions, on second reading, may be entitled to entertain amendments that Parliament has never considered.²⁵⁹ Finally, any assessment of the procedure must consider the fact that gains made in parliamentary power come at the cost of additional complexity and potential for delay in the legislative process.²⁶⁰

Despite their shortcomings, the expansion of qualified majority voting and the introduction of parliamentary cooperation represent the Single European Act's most significant elements of institutional reform. Though the former primarily affects the Commission, and the latter the Parliament, together they reflect both a real and symbolic shift in influence within the Community system away from the Member States. The increase in use of qualified majority voting in the Council necessarily weakens the single-nation veto, thereby enabling the Commission and Council to pass legislation more easily over the objection of minority states. Those states are thus rendered more amenable to compromise. To the extent that the cooperation procedure enhances the power and status of Parliament,²⁶¹ it too strengthens an integrationist voice within the Community. In the final analysis, however, both initiatives (much like the Act's treatment of delegation to the Commission) should be viewed not simply as institutional reform for its own sake, or for the sake of strengthening a Community outlook, but also as aspects of the Single Act's overriding programmatic goal of creating a market without internal frontiers. Achieving that goal entails the adoption of a great deal of legislation before the end of 1992. The adoption of this legislation represents a challenge to the institutions that, even under the most favorable of circumstances, may prove to be beyond the Community's political resources.²⁶² The chances of success in this integrationist venture can only be aided by creating more room for majority-vote legislation and by enlarging Parliament's opportunities to participate meaningfully in the legislative process.

259. See *supra* notes 241-246 and accompanying text.

260. See *supra* notes 238, 247-248 & 257 and accompanying text.

261. The Single Act's belated substitution of the term Parliament for Assembly further evidences an intent to elevate Parliament's standing. SEA, *supra* note 1, art. 3(1). The European Parliament had adopted that name of its own accord as early as 1962. *Parliamentary Resolution of March 30, 1962*, 5 J.O. COMM. EUR. 1045 (1962).

262. On the progress to date of the internal market program, as assessed periodically by the Commission, see *supra* notes 92-101 and accompanying text.

C. *The Future of the Luxembourg Accords*

The Single European Act's emphasis on qualified majority voting, whether under the ordinary or the cooperation procedure for legislation, gives new importance to the question of the continued vitality of the Luxembourg Accords.²⁶³ Under this so-called "gentlemen's agreement" of 1966, every Member State enjoys a political veto over measures it declares to be contrary to a vital national interest, even when the Council ordinarily may adopt those measures by a simple or qualified majority vote.²⁶⁴ If a Member State invokes a vital national interest on any given matter, discussion in the Council must proceed until consensus is reached.

Curiously, the Single Act does not directly address the question of whether and to what extent the Luxembourg Accords, whose compatibility with the original Treaty has always been doubtful,²⁶⁵ survive the expansion of qualified majority voting. In fact, the negotiators appear to have sidestepped the issue altogether,²⁶⁶ and the Act does not even acknowledge the Accords' existence. This situation can be profitably contrasted with the treatment given the Luxembourg Accords by Parliament's Draft Treaty of European Union. That treaty expressly provided for a ten-year transitional period during which a Member State might continue to require the postponement of action it considered contrary to its vital national interests, but only if the state invoking that right gave a reasoned explanation for doing so and the Commission certified that the national interest implicated was indeed vital.²⁶⁷ The contrast between the Draft Treaty's precision on the future of the Luxembourg Accords and the Single Act's silence on the subject is striking.

Although it avoided the matter, the Single European Act does not provide a hospitable climate for the Luxembourg Accords. It is

263. For the text of the Luxembourg Accords, see 9 BULL. EUR. ECON. COMM. (NO. 3) 9 (1966).

264. See generally Campbell, *The Single European Act and the Implications*, 35 INT'L & COMP. L.Q. 932, 935 (1986). The Luxembourg Accords are actually subject to various interpretations. The French view traditionally has been that a measure on which the Accords are invoked may be adopted only by consensus. Other states have considered that the Accords simply require reasonable attempts to reach agreement. The Luxembourg Accords have been called the framework for an "agreement to disagree" within the Community. Murphy, *supra* note 3, at 18; Usher, *supra* note 242, at 65.

265. Campbell, *supra* note 264, at 935; Pescatore, *supra* note 19, at 13.

266. J. DE RUYT, *supra* note 42, at 117-18.

267. *Draft Treaty*, *supra* note 5, art. 23(3). The grounds for postponing action were to be published. *Id.* The provision's wording ("the vote shall be postponed so that the matter may be reexamined") preserves the ambiguity of the meaning of the Luxembourg Accords. See *supra* note 264. The Dooze Committee Report, *supra* note 18, ch. III(A)(b), had also favored developing criteria for resort to the Luxembourg Accords.

doubtful that a national veto may properly be cast when, particularly under the cooperation procedure, the Commission, a majority of the Parliament, and a qualified majority of the Council all agree on a policy matter. The political pressures against casting a veto in such a situation could and should be considerable,²⁶⁸ especially with respect to harmonization measures in aid of the internal market capable of adoption by qualified majority under article 100A. Now that a dissident state (subject of course to Commission and possibly Court review) may invoke a vital national interest to justify the continued application of national law in derogation from Community harmonization measures, resort to the political veto to prevent adoption of those measures seems inappropriate.²⁶⁹

Even outside of the new cooperation procedure, survival of the single state political veto is questionable.²⁷⁰ Given that wider use of majority voting has emerged as a principal strategy of institutional reform, the compromise of that principle represented by the Luxembourg Accords seems particularly outdated.²⁷¹ More specifically, to return to the practice of honoring Member State assertions of vital national interest would subvert the Single Act's system of qualified majority voting and thereby prejudice completion of the internal market, the centerpiece of Community reform. Certainly the expansion in community membership has only heightened the tendency toward bloc-voting in the Council, which in turn makes attaining unanimity on any legislative proposal increasingly problematic. Though arguments may be made to the contrary,²⁷² these considerations on balance fortify the presumption that matters legally subject to qualified

268. The Foreign Affairs Committee of the House of Commons described itself as "extremely skeptical" about the ability of British governments to invoke the Luxembourg compromise in the future, particularly in those areas of decisionmaking which the Single Act now subjects to qualified majority voting. Campbell, *supra* note 264, at 936. For somewhat different views, see McElhenny, *supra* note 89, at 61.

269. See *supra* note 71 and accompanying text.

270. Resort to the Luxembourg Accords has become rare in recent years. An important milestone was the Council's rejection of British assertions that the setting of farm prices in 1982 jeopardized vital national interests. The Council found that Britain was attempting to use the veto on one matter (farm prices) in order to secure concessions on an unrelated matter (the size of Britain's budgetary rebate). The episode is discussed in Campbell, *supra* note 264, at 937-38.

271. There may be a relationship between the Single Act's emphasis on qualified majority voting as an instrument of reform and the then very recent pattern of disuse of the Luxembourg Accords. See J. DE RUYT, *supra* note 42, at 117. Article 3 of the Act lends some textual support to the view that the Accords have no further place in Community practice. It affirms that the Community institutions "shall exercise their powers and jurisdiction under the conditions . . . provided for by the Treaties."

272. Arguably, if the Accords initially operated as a corrective to tyranny by the majority in the Council of Ministers, their utility has only increased with the Single Act's extension of qualified majority decisionmaking.

majority voting under the EEC Treaty should be decided in precisely that way.

VI. CONCLUSION

Measured against Parliament's Draft Treaty of European Union and other recent reform proposals, as well as against the stated preferences of the Commission and certain Member States, the Single European Act is not a revolutionary product. It consciously builds on existing Community foundations and on practices that have developed over the last thirty years. To achieve the consensus necessary for its adoption, the Act's drafters also deliberately sought to balance the concerns of the Community's twelve Member States. This attempt to accommodate various national interests explains why the package of institutional changes and extensions of Community competence represented by the Act fails to reflect any single vision of Community reform. Although their depiction as a giant step backward for Europe²⁷³ falls wide of the mark, the jurisdictional and institutional provisions of the Single European Act do have a decidedly modest and anticlimactic ring. Certainly the Act as a whole does not bring the Community appreciably closer to a state of political integration, much less a United States of Europe.

At this stage in Community history, can anything short of constitutionally momentous reform preserve the momentum needed for European political integration? The answer is a resounding "yes." In eschewing grand constitutional change, the reformers not only committed no error but actually avoided one. They made the centerpiece of their reform a set of attainable programmatic objectives in whose service the entire *acquis communautaire* could readily be enlisted, rather than a constitutional edifice whose appeal to the Member States would be less than universal and whose durability in moments of political difficulty could not be assured. Fortunately, the institutional changes that have been introduced, though modest, are calculated to make more effective the very governmental processes upon which the integrationist effort ultimately depends.

However unlikely it might seem against the background of original expectations and more recent hopes, the establishment of an area without internal frontiers as a reform strategy touches a receptive chord in contemporary European thinking. By most accounts, it serves the common economic interests of the Member States and their

273. Pescatore, *supra* note 19, at 9. Judge Pescatore describes the Single European Act as "unfortunately negative in most respects" and as "a severe setback for the European Community." *Id.* See generally Lodge, *supra* note 20, at 221.

populations.²⁷⁴ Its verifiable successes will generate a solidarity in economic fact, if not immediately in political theory. These successes will be felt concretely by a public whose confidence in the Community is critical to the furtherance of European political integration. At the same time, the failures of the internal market promise to be, at most, partial and essentially matters of degree. Because the dismantling of economic borders directly affects the people of Europe, it has a far greater capacity to mobilize opinion than abstract visions of a United States of Europe which are not yet widely shared. In targeting such goals, the architects of Community reform remained faithful to their functionalist tradition,²⁷⁵ without either abandoning or even compromising their ultimate ambition of a European Union.²⁷⁶ Despite the urging and the obvious temptations, they wisely did not attempt to produce European political integration simply by declaring it.

274. See McAleese & Matthews, *The Single European Act and Ireland: Implications for a Small Member State*, 26 J. COMMON MKT. STUD. 39, 57-59 (1987).

275. Functionalism basically posits that as governments jointly delegate decisionmaking authority to intergovernmental political institutions, those institutions tend to develop collective decisional processes. By a certain "spillover effect," the resulting sectoral integration of national economies in turn renders necessary even greater political and economic integration. Thus the conditions are created for still larger transfers of political power to the collective institutions. The decisive functionalist writings on the European Communities were E. HAAS, *THE UNITING OF EUROPE* (1958); L. LINDBERG, *THE POLITICAL DYNAMICS OF EUROPEAN ECONOMIC INTEGRATION* (1963).

276. At the outset, the Single Act affirms the signatories' intention "to transform relations as a whole among their States into a European Union." SEA, *supra* note 1, preamble, para. 1. See also *id.* art. 1, para. 1.